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n178. On the costs, see Abrams, 117 S. Ct. at 1949-51 (1997) (Breyer, J., dissenting).

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4.

Aim Tests. -

As of now, aim tests are not widely used in constitutional law, though Justice Scalia has urged their employment in several contexts as what might be viewed as surrogates for purpose tests. n179 In supporting an aim test for free exercise violations, in pre- [*88] ference to a direct inquiry into governmental purposes, Justice Scalia has argued that purpose inquiries are unseemly and judicially unmanageable. n180 Other Justices, however, have generally disagreed and - as discussed more fully below - have tended to prefer purpose tests, n181 which provide relatively more protection to constitutional rights, over aim tests, which provide relatively less protection. n182

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n179. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) (arguing that objective statutory aim, not subjective purpose or incidental effects, should be the focus of inquiry when a minority religious group claims that a statute that is neutral on its face violates free exercise rights); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576-79 (1991) (Scalia, J., concurring in the judgment) (maintaining that statutes that mostly regulate conduct, not pure speech, should escape judicial scrutiny under the O'Brien test unless they are aimed at, rather than merely have an incidental effect on or a subjective purpose of suppressing, expressive conduct).

n180. See Church of the Lukumi Babalu Aye, 508 U.S. at 558-59 (Scalia, J., concurring in part and concurring in the judgment).

n181. Interestingly, even Justice Scalia has accepted that purpose tests are a judicially manageable means of enforcing the Equal Protection Clause. See, e.g., M.L.B. v. S.L.J., 117 S. Ct. 555, 575 (1996) (Thomas, J., dissenting) (joined by Scalia, J.) (arguing that establishing a violation of the Equal Protection Clause requires proof of discriminatory motive).

n182. On the relation between aim and purpose tests, see note 99 above.

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C. Suspect- and Nonsuspect-Content Tests

Suspect-content tests, especially when deployed in tandem with nonsuspect-content tests, are hugely influential in implementing the Equal Protection and Due Process Clauses. In these vast doctrinal areas, statutes and policies that classify on suspect bases or infringe on fundamental rights are strongly presumptively unconstitutional; they can be upheld only if necessary to serve a compelling governmental interest. n183 By contrast, statutes and policies outside the suspect category enjoy a robust presumption of constitutionality under traditional rational basis review. n184

Suspect-content tests also play a large role under the First Amendment. Outside a few delimited categories, n185 regulations based on the content of speech are subject to the most exacting judicial scrutiny. n186

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n183. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

n184. See, e.g., Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) ("If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.'" (quoting Romer v. Evans, 116 S. Ct. 1620, 1627 (1996))); FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (stating that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" on a case-by-case basis).

n185. The number of such categories may be larger than is often appreciated. See Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark, 1994 Sup. Ct. Rev. 1, 21-28.

n186. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

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John Ely offers the most plausible explanation for the prominence of suspect-content tests in Equal Protection and First Amendment law - and, relatedly, for the highly deferential review accorded under the Equal Protection and Due Process Clauses to nonsuspect statutes, [*89] regulations, and policies. n187 Ely's explanation links concerns about reasonable disagreement in constitutional law with claims about when such disagreements should be resolved by democratic processes.

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n187. See John Hart Ely, Democracy and Distrust 75-77, 105-79 (1980).

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Crudely summarized, Ely's theory holds that courts, in interpreting the Constitution's more open-ended provisions, should generally defer to the judgments of politically accountable decisionmakers. n188 Reasonable people will disagree about whether, for example, legislation benefiting some groups and harming others is fair or unfair; no reliable method exists for resolving the moral disputes; n189 and, in such circumstances, the basic commitment of the Constitution is to permit decision by democratic majorities and their elected representatives. n190 Given the Constitution's central commitment to political democracy, the crucial role of the courts is not to second-guess the substantive decisions of the political branches, but to ensure the integrity of the democratic process. n191 In performing this function, courts should strictly scrutinize statutes of the kinds most likely to trigger suspect-content tests under current doctrine. n192 Somewhat more particularly, courts should strictly scrutinize statutes that discriminate against "discrete and insular" n193 minorities, since statutes of this kind are likely to reflect prejudices that render the democratic process untrustworthy. n194 Under Ely's

"representation-reinforcing" approach, courts should also apply strict scrutiny to statutes that restrict the flow of speech and ideas on which political democracy depends or that otherwise clog the channels of political change. n195

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n188. See id. at 101-04, 183.

n189. See id. at 54 ("Our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives.").

n190. See id. at 88-104.

n191. See id. at 102-03 ("The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust' as opposed to a "regulatory' orientation to economic affairs -- rather than dictate substantive results it intervenes only when the "market,' in our case the political market, is systemically malfunctioning." (footnote omitted)).

n192. See id. at 105-79.

n193. Id. at 148 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

n194. See id. at 145-70.

n195. See id. at 87-88, 105-34.

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In suggesting that Professor Ely's theory helps to explain the central role of suspect- and nonsuspect-content tests under the Due Process and Equal Protection Clauses and of suspect-content tests under the First Amendment, I do not claim that the Court has accepted his prescriptions on a global basis; many important constitutional doctrines are impossible to reconcile with Ely's theory. n196 I mean only to [*90] note some important convergences between Supreme Court practice and Ely's commended approach. First, the Court manifestly worries about lower courts substituting their judgment for that of politically accountable institutions in areas of reasonable disagreement. This is especially true in the broad, politically contestable domain of economic regulation that is subject to challenge under the Due Process and Equal Protection Clauses. Second, nonsuspect-content tests reflect a deferential judicial stance based largely on this worry. Third, prominent suspect-content tests are plausibly viewed as aimed at correcting process deficiencies that would render the decisions of political bodies singularly unworthy of judicial deference.

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n196. These include the doctrines that subject some forms of legislation to searching judicial scrutiny on Asubstantive due process" grounds, see, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992), that subject affirmative action programs benefiting minority groups to strict judicial scrutiny, see, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), and that

provide heightened scrutiny of all gender-based classifications, regardless of whether they disadvantage men or women, see, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982). See generally John Hart Ely, Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures, 77 Va. L. Rev. 833 (1991) (acknowledging that judicial practice has diverged from the theory set out in Democracy and Distrust).

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D. Purpose Tests (and Their Plausible Surrogates) in Constitutional Law

Doctrinal tests in constitutional law reflect broader concerns with the legitimacy of governmental purposes than is usually appreciated. n197 A number of constitutional doctrines call for direct inquiries into governmental purposes. Other doctrines employ tests that can be viewed as surrogates for purpose tests: n198 they avoid direct inquiry into the government's purposes, but nonetheless adopt presumptions of unconstitutionality or assign burdens of proof that can reasonably be understood as reflecting suspicion that when the government regulates on certain suspect bases, or when legislation has certain troubling effects, the government in fact has an illicit purpose. When purpose tests and their surrogates play a central role in constitutional doctrine, at least part of the explanation frequently lies in phenomena arising from reasonable disagreement about what the Constitution means or how it ought to be applied.

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n197. But cf. Bhagwat, supra note 82, at 301 (identifying a "trend within the Court's jurisprudence toward an increased focus" on governmental "ends" and "purposes"); Richard H. Pildes, Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law, 45 Hastings L.J. 711, 712 (1994) (arguing that "much of constitutional law" involves a process by which "courts evaluate the different kinds of reasons that are off limits to government in different arenas").

n198. For a discussion of why these tests can be viewed as "surrogates" rather than alternatives, see pp. 94-95 below.

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1.

Explicit Inquiries into Forbidden Purposes. -

Little more than a quarter century ago, the Supreme Court could claim with some plausibility that the government's actual purposes in enacting legislation were constitutionally irrelevant. n199 Today, numerous constitutional [*91] doctrines explicitly inquire whether the government has acted for forbidden reasons. With no pretense of exhaustiveness, a few examples should make the point. n200

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n199. See, e.g., Palmer v. Thompson, 403 U.S. 217, 224-26 (1971) (refusing to consider the motivation behind a city's closing of racially integrated swimming pools); United States v. O'Brien, 391 U.S. 367, 383 (1968) (finding that "inquiries into congressional motives or purposes are a hazardous matter"); cf. Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) (concluding that the Court is not "at liberty" to inquire into the legislature's motives for repealing the Court's appellate jurisdiction in habeas corpus cases).

n200. For a partly overlapping list of doctrines aimed at barring legislation likely animated by the "naked preferences" of one group to achieve some goal at the expense of another group, see Sunstein, cited above in note 172, at 1704-27.

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The Equal Protection Clause. In the leading case of Washington v. Davis, n201 the Supreme Court expressly rejected arguments in favor of effects and balancing tests and made discriminatory purpose the touchstone of equal protection inquiries involving statutes that do not facially discriminate against racial or other protected minorities. n202 When the government's motives are discriminatory, a facially neutral statute is invalid. n203 But if the government has no discriminatory purpose, n204 a statute will be upheld despite a racially disparate impact, as long as the statute is not arbitrary or irrational. n205

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n201. 426 U.S. 229 (1976).

n202. See id. at 238-48. But see Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105, 1107, 1135-36 (1989) (arguing that, contrary to what the Court has said in Washington v. Davis and other cases, equal protection doctrine actually involves a covert balancing of competing constitutional and governmental interests).

n203. See Davis, 426 U.S. at 238-43.

n204. The Court has elaborated on the nature of the discriminatory intent that is forbidden. See Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (defining discriminatory purpose in terms of actions taken ""because of,' not merely "in spite of,' its adverse effects upon an identifiable group"); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (suggesting that proof of a discriminatory purpose "would not necessarily have required invalidation of the challenged decision," but would have shifted the burden to establish "that the same decision would have resulted even had the impermissible purpose not been considered").

n205. See Davis, 426 U.S. at 242-45; see also City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (holding that discriminatory intent is also necessary to establish a violation of the Fifteenth Amendment guarantee of equal voting rights).

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Governmental purpose is also crucial in equal protection challenges to statutes that discriminate against classes not ordinarily protected by

heightened judicial scrutiny. The Supreme Court has held that a bare desire to harm an unpopular group is not a constitutionally legitimate interest. n206 On this basis, the Court has invalidated legislation intended to harm hippies, n207 the mentally retarded, n208 and homosexuals. n209

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n206. See United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973), cited in Romer v. Evans, 116 S. Ct. 1620, 1628 (1996).

n207. See Moreno, 413 U.S. at 534-35.

n208. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

n209. See Romer, 116 S. Ct. at 1627-28.

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The Free Speech Clause. It is axiomatic under the First Amendment that the government may not prohibit speech or expressive ac- [*92] tivity because it disagrees with particular ideas. n210 If government's purpose is censorial, the relatively relaxed standards that would otherwise test the permissibility of "time, place, and manner" regulations and of restrictions on expressive conduct do not apply. n211

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n210. See R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

n211. R.A.V., 505 U.S. at 386.

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The Establishment Clause. In Lemon v. Kurtzman, n212 decided in 1971, the Supreme Court summarized settled doctrine as deeming legislation invalid under the Establishment Clause if, among other things, it was enacted for the purpose of promoting or inhibiting religious exercise. n213 The Lemon test has drawn sharp attack in recent years, n214 but has never been rejected by a Supreme Court majority opinion. n215 Even if Lemon were replaced, however, inquiries concerning governmental purposes would almost surely survive, although in slightly altered form. It continues to be relatively uncontroversial that a statute passed for the purpose of deterring religious practice should be held unconstitutional n216 - under the Free Exercise Clause, n217 if not the Establishment Clause. n218 Moreover, the "endorsement" test that has been [*93] favored by some Justices in recent years as a measure of Establishment Clause violations n219 retains a place for inquiries into governmental purposes. n220

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n212. 403 U.S. 602 (1971).

n213. See id. at 612-13. The Court has subsequently pointed to forbidden governmental purposes as grounds for holding that a public school cannot mandate that biology classes teach creationism as an alternative theory to evolution. See Edwards v. Aguillard, 482 U.S. 578, 594 (1987). A forbidden purpose has also led to the invalidation of a statute prescribing that the school day should begin with a moment of silence for meditation or private prayer. See Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

n214. See Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (characterizing the Lemon test as a Aformulaic abstraction[ ] ... which has received well-earned criticism from many Members of this Court"); Bowen v. Kendrick, 487 U.S. 589, 615-16 (1988) (noting that the "entanglement" prong of the Lemon test "has been much criticized over the years"); Wallace, 472 U.S. at 110 (Rehnquist, J., dissenting) ("The three-part [Lemon] test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.").

n215. See generally supra note 167 (discussing tests applied in recent Establishment Clause cases).

n216. See Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).

n217. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (citation omitted)). But cf. id. at 558 (Scalia, J., concurring in part and concurring in the judgment) (rejecting an inquiry into lawmakers' subjective purposes and calling instead for an examination of the statute's Aobject").

n218. Professor Tribe maintains that purpose either does not or should not matter to Establishment Clause inquiries. See Tribe, supra note 78, at 28-32. In his view, the crucial question is whether government action has the Aeffect" of promoting, inhibiting, or endorsing religion. Governmental action that was taken for the purpose of achieving one of these effects, but failed to do so, would not violate the Constitution; it would have the character of a "failed attempt." Id. at 28-29. Tribe is right that in the absence of some effect, no judicially actionable constitutional violation would occur. He uses the example of a school board that prescribes the teaching of trigonometry because it hopes that exposure to triangles will promote belief in the Holy Trinity. See id. at 29. It does not follow, however, that the legal pertinence of "effects" can always be assessed independently of the government's purposes in achieving those effects. The effect of making Christmas Day a holiday may be the same regardless of whether the government's purpose in doing so is to promote Christianity or to provide a winter holiday on which friends and families can gather for either secular or religious celebrations. But both the nature and the

constitutionality of the government's act depend on the government's purpose. Within this framework, the requirement that there must be some effect for there to be a constitutional violation is like a "standing" rule; in the absence of any effect on constitutional values, no one would be hurt, and no one would have Astanding" to invoke the judicial power to seek a remedy. But when there is enough of an effect to ground standing, purpose may play a crucial role in determining whether a constitutional violation can be established on the merits.

n219. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773-78 (1995) (O'Connor, J., concurring in part and concurring in the judgment); id. at 784 (Souter, J., concurring in part and concurring in the judgment); id. at 799-800 (Stevens, J., dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) (Blackmun, J.) (adopting the endorsement test in the plurality opinion); id. at 624-25 (O'Connor, J., concurring in part and concurring in the judgment); Wallace, 472 U.S. at 76 (O'Connor, J., concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 688-89 (1984) (O'Connor, J., concurring) (proposing the endorsement test for the first time); see also Greenawalt, supra note 167, at 370 (concluding that, in the various opinions in Pinette, "five Justices considered endorsement in some form to be critical").

For discussion of the "endorsement test" and, in particular, the reliance on a conception of a "neutral" or Areasonable" observer, see Laurence H. Tribe, American Constitutional Law 1293 (2d ed. 1988); Neal R. Feigenson, Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine, 40 DePaul L. Rev. 53, 82-83 (1990); Joel S. Jacobs, Endorsement as "Adoptive Action:" A Suggested Definition of, and an Argument for, Justice O'Connor's Establishment Clause Test, 22 Hastings Const. L.Q. 29, 38-42 (1994); Kenneth L. Karst, The First Amendment, the Politics of Religion and the Symbols of Government, 27 Harv. C.R.-C.L. L. Rev. 503, 516 (1992); and Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266, 291-95 (1987).

n220. See County of Allegheny, 492 U.S. at 592 ("In recent years, we have paid particularly close attention [in Establishment Clause cases] to whether the challenged governmental practice either has the purpose or effect of "endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."); Wallace, 472 U.S. at 76 (O'Connor, J., concurring in the judgment) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the governmental act] as a state endorsement of [religion]." (emphasis added)); Lynch, 465 U.S. at 690 (O'Connor, J., concurring) (stating that to determine Awhether Pawtucket has endorsed Christianity ... we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed").

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The Free Exercise Clause. A strong majority of the Supreme Court has held that legislation enacted for the purpose of burdening or discouraging religious practice violates the Free Exercise Clause. n221

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n221. See Church of the Lukumi Babalu Aye, 508 U.S. at 532-33.

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The Dormant Commerce Clause. Settled doctrine under the dormant commerce clause forbids the states to impose taxes or establish [*94] other trade barriers that purposefully discriminate against interstate commerce. n222 Taxes and other regulations do not survive judicial scrutiny simply because they are nondiscriminatory on their faces. If the purpose of a facially nondiscriminatory regulation is to protect in-state economic interests against competition from out-of-staters, the regulation is invalid. n223

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n222. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1597 (1997); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984).

n223. See Lisa Heinzerling, The Commercial Constitution, 1995 Sup. Ct. Rev. 217, 256 (asserting that under current doctrine, "the Commerce Clause serves a function much like the Equal Protection Clause -- that of disapproving certain reasons for government action"); cf. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 352 (1977) (considering evidence that a facially neutral statute was enacted for a discriminatory motive).

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Substantive Due Process. Under the Supreme Court's decisions in Roe v. Wade n224 and Planned Parenthood v. Casey, n225 the constitutionality of some abortion regulations may depend on the government's purpose. n226 For example, the government may enact "incidental" regulations designed to ensure that a woman has made an informed decision about whether to have an abortion, n227 but (at least on one reading of Casey) a state may not legislate for the purpose of stopping a woman who has made an informed decision from implementing her choice to abort a nonviable fetus. n228

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n224. 410 U.S. 113 (1973).

n225. 505 U.S. 833 (1992).

n226. Cf. Mazurek v. Armstrong, 117 S. Ct. 1865, 1867 (1997) (assuming arguendo that legislation motivated by a purpose of interfering with abortion rights would be unconstitutional but finding that the record did not establish such a purpose).

n227. See Casey, 505 U.S. at 872.

n228. See id. at 877; Bhagwat, supra note 82, at 329. An alternative reading of Casey would treat the "undue burden" standard as establishing an "effects" test and as precluding the further protection that would be given by a "purpose" test.

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2.

Tests Plausibly Viewed as Surrogates for Forbidden-Purpose Tests. -

On the surface, forbidden-content, suspect-content, and effects tests appear to be alternatives to purpose-focused inquiries. On closer examination, however, many content-based and effects-based tests can reasonably be viewed as surrogates for purpose tests. As an initial matter, the notion that other kinds of tests could be surrogates for purpose tests may seem mysterious. This formulation may suggest that purpose tests enjoy a kind of primacy, and it may therefore seem incompatible with my earlier insistence that the tests employed in constitutional law typically all stand on the same footing, as available but seldom necessary mechanisms for implementing the Constitution. n229 The explanation for treating other kinds of tests as sometime surrogates for purpose tests rests on the premise that within the project of implementing the Constitution, in which courts frequently rely on other branches of government to respect constitutional norms that are [*95] judicially underenforced, actions taken for unconstitutional purposes typically constitute especially egregious breaches of constitutional trust - seldom mitigated by considerations of reasonable disagreement, for example. If the underlying constitutional norms are not relatively fully protected by other kinds of tests, there may be an especially urgent interest in ensuring judicial protection against violations of this kind. Although purpose tests obviously offer the most straightforward protection against unconstitutionally motivated action, it sometimes may be difficult to prove in particular cases that the government acted for a forbidden reason. n230 Moreover, because such a determination may be insulting, courts may hesitate to reach this conclusion on a case-by-case basis. n231 In light of history and familiar psychology, however, some types of actions - as identified either by their contents or their effects - can be seen in the aggregate as likely to reflect forbidden purposes. n232 When this is so, a sensible doctrinal response is to elevate the applicable level of scrutiny. n233

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n229. See supra Part I.

n230. See Fried, Types, supra note 1, at 60-63; Kagan, supra note 87, at 438-39.

n231. See Regan, supra note 90, at 1285.

n232. See Fried, Types, supra note 1, at 61, 63; Kagan, supra note 87, at 451.

n233. See Fried, Types, supra note 1, at 62; Kagan, supra note 87, at 451.

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Suspect classifications under the Equal Protection Clause. Under the Equal Protection Clause, statutes that discriminate on the basis of race and other suspect and semi-suspect classifications trigger heightened judicial scrutiny. n234 Among the considerations supporting this rule is that statutes drawing distinctions on suspect bases are often likely to reflect forbidden purposes.

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n234. See United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (applying intermediate scrutiny for gender-based classification); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny for race-based classification).

n235. See Ely, supra note 187, at 145-48; John Hart Ely, The Centrality and Limits of Motivation Analysis, 15 San Diego L. Rev. 1155, 1156 (1978); Fried, Types, supra note 1, at 62-63.

It is not my claim that the only reason to object to statutes facially discriminating on the basis of race is that they are likely to reflect forbidden purposes. Statutes explicitly discriminating against racial and other suspect minorities may also be objectionable because they express a message that certain groups occupy a status inferior to others, or because discrimination against minorities in the distribution of certain benefits or burdens offends the core historical meaning of the Equal Protection Clause, or because discriminatory statutes and policies are likely to reflect prejudice.

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Though formally framed in suspect-content terms, the Supreme Court's affirmative action jurisprudence manifests a clear preoccupation with what the Court takes to be constitutionally forbidden purposes. n236 Two relevant themes run through the cases. First, although governmental bodies have a compelling interest in remedying their own past discrimination, the purpose of race-based redistribution for [*96] its own sake is an impermissible one. n237 Second, an important reason for subjecting affirmative action programs to strict scrutiny is to "smoke out" impermissible, covertly redistributive (rather than remedial) motives. n238

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n236. See Bhagwat, supra note 82, at 314-15; David A. Strauss, Affirmative Action and the Public Interest, 1995 Sup. Ct. Rev. 1, 25-26 (1996).

n237. See Adarand Constructors, 515 U.S. at 235-36; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-499 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

n238. J.A. Croson Co., 488 U.S. at 493; see Adarand Constructors, 515 U.S. at 226; Strauss, supra note 236, at 26.

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The Free Speech Clause. "Content neutrality" has emerged as the central concept in modern free speech doctrine. n239 The Court applies a balancing test to statutes that regulate speech in a content-neutral way - for example, by prohibiting all picketing, regardless of content, within 100 feet of an elementary school. n240 By contrast, statutes that regulate speech on the basis of content are presumed unconstitutional. n241 As a result, it may sometimes be permissible under the First Amendment for the government to enact a relatively

broad ban, such as a prohibition against all picketing close to elementary schools, but not to enact a narrower regulation that would actually permit more speech, such as a prohibition against all picketing except labor picketing. n242 As Elena Kagan argues, the most convincing explanation for this apparent anomaly involves a presumption about governmental purposes: when the government regulates speech on the basis of content, there is reason to suspect that it has acted for the forbidden purpose of shielding citizens from ideas that the government finds objectionable. n243

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n239. For probing discussions of the concept of content neutrality, see, for example, Kagan, cited above in note 87, at 456-72; Stone, cited above in note 63, at 48-52; and Williams, cited above in note 63, at 722-28.

n240. See, e.g., Grayned v. Rockford, 408 U.S. 104, 115 (1972) (upholding a content-neutral prohibition against disruptive picketing outside a school).

n241. The leading case is Police Department v. Mosley, 408 U.S. 92 (1972), which invalidated an ordinance banning all picketing except labor picketing within 150 feet of a school building during school hours. See id. at 94. For commentary, see Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21 (1975).

n242. See Mosley, 408 U.S. at 94; cf. Kagan, supra note 87, at 445 (noting similar seeming anomalies); Stone, supra note 63, at 54 (same).

n243. See Kagan, supra note 87, at 451; see also Kathleen M. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1997 Sup. Ct. Rev. 123, 127 (noting a view of First Amendment cases under which "the form of a regulation -- content-specific or content-neutral -- matters mostly as evidence of its purpose, but purpose is the predominant consideration").

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Another First Amendment doctrine reflecting concern about impermissible purposes demands relative determinacy in schemes for licensing the use of public fora. n244 For example, a town can prohibit parading without a permit, but only if the standards for awarding [*97] permits leave little room for discretion. n245 Otherwise, licensing officials might favor some speakers and disfavor others on forbidden bases. n246

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n244. See, e.g., City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 769-70 (1988); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); Kagan, supra note 87, at 457.

n245. See Cox v. New Hampshire, 312 U.S. 569, 575 (1941). For criticism, see C. Edwin Baker, Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations, 78 Nw. U. L. Rev. 937, 993-94 (1984).

n246. See Saia v. New York, 334 U.S. 558, 562 (1948); Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853, 867 (1991).

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Distinction of direct and incidental burdens. The Supreme Court has sometimes treated burdens as "incidental," and thus as not triggering heightened judicial review, even when they directly impede the exercise of a fundamental right. n247 Examples include statutes that n248 and those that compel people to undergo blood tests before they marry. n249 When courts find that such statutes impose only "incidental" burdens on fundamental rights, the explanation cannot be that the statutes are not targeted directly at constitutionally protected conduct. Instead, the doctrine deems burdens such as these to be "incidental" when they do not make the ultimate exercise of a right too difficult and, equally crucially, when the Court views their purposes as legitimate. n250 For example, the Court would almost surely not regard a blood test requirement as incompatible with the values supporting the right to marry. n251 More controversially, it does not see the purpose of encouraging women to deliberate before having an abortion as inconsistent in principle with the abortion right. n252

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n247. See Planned Parenthood v. Casey, 505 U.S. 833, 887 (1992) (plurality opinion); Dorf, supra note 161, at 1219-29.

n248. See Casey, 505 U.S. at 885.

n249. See Dorf, supra note 161, at 1226; cf. Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring) (listing numerous state regulations governing marriage).

n250. See Bhagwat, supra note 82, at 349-50; Dorf, supra note 161, at 1226-28.

n251. See Dorf, supra note 161, at 1226.

n252. For diverse views about whether state efforts to promote deliberation are consistent with the abortion right, see Ronald Dworkin, Life's Dominion 151-53 (1993); Jane Maslow Cohen, A Jurisprudence of Doubt: Deliberative Autonomy and Abortion, 3 Colum. J. Gender & L. 175, 193-219 (1992); James E. Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1, 10-14 (1995); and Robert D. Goldstein, Reading Casey: Structuring the Woman's Decisionmaking Process, 4 Wm. & Mary Bill Rts. J. 787, 802-07 (1996).

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Incidental burdens under the dormant commerce clause. As a formal matter, the Supreme Court applies a balancing test to statutes that do not facially or intentionally discriminate against interstate commerce. n253 As a practical matter, however, the judicial inquiry generally lacks bite unless a state regulatory statute disproportionately affects out-of-staters or the flow of goods in interstate commerce. n254 In cases [*98] of disproportionate impact, it is typically plausible to think that the statute's effect mirrors its purpose - that a statute that disproportionately disadvantages out-of-staters in economic competition with in-staters was enacted for the purpose of doing so.. n255

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n253. See Regan, supra note 90, at 1092.

n254. See id. at 1206-07; see also CTS Corp. v. Dynamics Corp., 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring in part and concurring in the judgment) (observing that, notwithstanding contrary dicta, the Court generally does not and in any case should not apply a "balancing" test to invalidate "statutes that neither discriminate against commerce nor present a threat of multiple and inconsistent burdens").

n255. See Sunstein, supra note 172, at 1708.

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3.

Purpose-Based Tests and the Judicial Role. -

The most familiar explanation of the relevance of governmental purpose in constitutional law builds on Holmes's aphorism that "even a dog distinguishes between being stumbled over and being kicked." n256 The point, I take it, is that we often cannot even characterize an act without understanding what motivated it. Within deeply entrenched ethical structures, what people (like dogs) are often owed is concern, care, or respect, and not necessarily a particular outcome. n257 When constitutional doctrine is viewed against this background, there is nothing mysterious about the idea that the quality and permissibility of governmental acts, and hence their constitutionality, should sometimes depend on their purposes. n258

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n256. Oliver Wendell Holmes, The Common Law 7 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881); see Kagan, supra note 87, at 510; Tribe, supra note 78, at 17.

n257. See Fried, Types, supra note 1, at 64; Kagan, supra note 87, at 511; Tribe, supra note 78, at 17.

n258. This general explanation is also compatible with, although distinct from, Professor Pildes's insightful argument that purpose inquiries sometimes protect structural constitutional values; limiting the purposes for which government can act helps to restrain what otherwise might be the nearly boundless reach of governmental authority and influence. See Pildes, supra note 197, at 722-49; Richard H. Pildes, Two Conceptions of Rights in Cases Involving Political "Rights," 34 Hous. L. Rev. 323, 325-29 (1997).

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Although it is relatively easy to see why action for forbidden motives offends constitutional norms, important questions remain unanswered. Why, for example, has constitutional doctrine, which frequently underenforces constitutional norms, come to include so many purpose tests? Purpose tests represent one important mechanism, but not always a necessary one, for protecting constitutional values. As I noted earlier, little more than

twenty-five years ago the Supreme Court could plausibly maintain that governmental purpose was irrelevant under existing constitutional doctrine. Moreover, purpose inquiries are sometimes costly to conduct, often threaten insult to other branches of government, and may present formidable evidentiary difficulties. n259 Indeed, the Supreme Court continues to reject purpose-based inquiries in some areas of constitutional law. n260

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n259. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) ("It is virtually impossible to determine'the singular "motive' of a collective legislative body ...."); Ely, supra note 235, at 1160; Karst, supra note 90, at 1164-65; Smith, supra note 219, at 284-90.

n260. The Court has determined, for example, that "subjective intentions play no role in ordinary, probable-cause ... analysis" conducted to determine whether a search or seizure is reasonable and therefore permissible under the Fourth Amendment. Whren v. United States, 116 S. Ct. 1769, 1774 (1996). In Ohio v. Robinette, 117 S. Ct. 417 (1996), the Court applied this analysis to find that, when a police officer would be justified by the objective circumstances in asking a driver to exit an automobile, "subjective thoughts" are irrelevant. Id. at 421; cf. Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982) (holding that governmental officials should not be stripped of their "qualified immunity" from suits for damages upon a showing that they acted for malicious purposes).

One way to view these cases is as illustrations of the thesis that some constitutional doctrines underenforce constitutional norms. Litigating the state of mind of an individual governmental actor is highly fact-intensive, and often it can intrude upon and disrupt ordinary governmental activity. See, e.g., id. at 816-17. In cases involving constitutional challenges to statutes and to policies of general applicability, the Court has generally concluded that the costs of inquiries into purpose are worth bearing. On one hand, in the absence of purpose tests, constitutional norms could often be subverted on a broad scale; on the other hand, the costs of litigating statutory purpose in a single facial challenge will not normally be too large. By contrast, litigating the state of mind of individual decisionmakers on a case-by-case basis may reasonably be deemed too costly and inefficient a means of protecting constitutional values in some circumstances. It is also relevant, of course, whether other tests are available to protect underlying norms, and how effectively such tests do so. In the Fourth Amendment area, in particular, the Court obviously believes that the costs of litigation involving purpose would be high, and that underlying constitutional values can be reasonably effectively protected through "objective" tests that are easier to administer under the circumstances. Cf. id. at 815-17 (explicitly weighing costs and benefits in rejecting "subjective" motive inquiries in cases in which governmental officials are sued for damages in their official capacities, and making the scope of "good faith" immunity turn entirely on "objective" factors).

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[*99]

A related question emerges from comparison of the prominence of purpose tests and their surrogates with the lesser roles played by some of the other constitutional tests discussed earlier. Why, under existing doctrine, does

proof of unconstitutionality so often depend on satisfying either a purpose test or a surrogate for a purpose test?

The answer to these questions depends substantially on phenomena involving reasonable disagreement in constitutional law. First, within a doctrinal regime in which the Court frequently treats the possibility of reasonable disagreement as a ground for judicial deference, purpose tests single out a class of cases in which deference to the judgments of the political branches would be singularly misplaced. When political officials act for constitutionally illegitimate reasons, they forfeit any reasonable claim to judicial deference.

Second, as currently framed by the Supreme Court, purpose-focused constitutional doctrines respond to some of the problems arising from reasonable disagreement among the Justices themselves about the appropriate structure of constitutional doctrine. To see why, it is useful to consider which motives or purposes the Court deems constitutionally impermissible. It is difficult to generalize about this issue, because whether a purpose is forbidden often depends on the particular constitutional provision against which it is tested. n261 Nevertheless, [*100] it seems fair to say that, with few exceptions, the purposes that are held forbidden tend to reflect an overlap of, or consensus among, n262 otherwise competing constitutional theories. n263 For example, commentators have advanced a host of theoretical justifications for the First Amendment's Free Speech Clause. n264 Yet virtually all of the leading theories would find it impermissible - albeit for different reasons - for the government to attempt to stifle communication based on its hostility to particular ideas. n265 There is a similar competition of views about the reach of the Free Exercise Clause. n266 Again, however, all prominent theories agree that government may not purposely single out religious conduct for disfavored treatment. n267 A final example of overlapping consensus emerges from the dormant commerce clause. [*101] Among those who accept that the Commerce Clause imposes limits on permissible state regulation, there is much dispute about which theory should guide judicial decisionmaking. n268 Nevertheless, nearly all concur that tax and regulatory legislation that is enacted for the purpose of protecting in-staters from out-of-state economic competition is virtually per se impermissible. n269

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n261. See Bhagwat, supra note 82, at 331-37 (arguing that the legitimacy of purposes depends on and varies with constitutional provisions); Choper, supra note 86, at 493-500, 502-08 (discussing permissible and impermissible motives under the religion clauses and the Equal Protection Clause).

n262. Cf. Rawls, supra note 11, at 43-44 (arguing that the liberal principles characteristic of democratic societies reflect an "overlapping consensus" among reasonable "comprehensive" views that disagree in their further terms). Whereas the "comprehensive" views to which Rawls refers may overlap in their recognition of the full set of principles defining political justice, the overlap of competing constitutional theories on purpose tests may not similarly reflect any of those theories' full conception of constitutional justice. Rather, the theories may agree on the propriety of purpose tests, but disagree about other constitutional matters. Indeed, their disagreements may extend to the question whether purpose tests should be supplemented by other kinds of tests to ensure that constitutional values are protected adequately.

n263. In at least some areas, of course, the question whether a particular purpose is permissible or impermissible is hotly contested. See, e.g., Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1374 (1997) (involving a dispute between the majority and dissenting opinions over whether the state had a legitimate interest in "the stability of its political system[ ]," which it was entitled to support by "enacting reasonable election regulations that [tend to] favor the traditional two-party system"); Samuel Issacharoff & Richard Pildes, No Place for Political Gerrymandering, Tex. Law., Aug. 5, 1996, at 25 (challenging judicial acceptance of preservation of incumbents' seats as a legitimate state purpose in drawing voting districts).

n264. For useful surveys, see Frederick Schauer, Free Speech: A Philosophical Enquiry 15-86 (1982), and Kent Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119, 130-54 (1989).

n265. To cite just a few examples of relevant First Amendment theories, legislation such as this would interfere with the free operation of the marketplace of ideas, cf. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that Athe best test of truth is the power of the thought to get itself accepted in the competition of the market"); it would infringe the "autonomy" interests of citizens in being able to decide for themselves what to read and believe, see, e.g., Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 215-20 (1972); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 353-60 (1991); it would offend the principle that governmental censorship is incompatible with the presuppositions of political democracy, see, e.g., Ely, supra note 187, at 105; it would thwart individual efforts to achieve Aself-realization" through expression and free traffic in ideas, see Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 594 (1982); and it would permit the stifling of the dissenting voices that a democratic and vibrant society ought to foster, see Shiffrin, supra note 7, at 90-96.

n266. Compare, e.g., Christopher Eisgruber & Lawrence Sager, Why the Religious Freedom Restoration Act Is Unconstitutional, 69 N.Y.U. L. Rev. 437, 448 (1994) (arguing that the Free Exercise Clause prohibits only governmental singling out of religious minorities and religious practices for disfavored treatment), with, e.g., Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 168-69 (1992) (arguing that the Free Exercise Clause protects religiously motivated conduct).

n267. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

n268. For overviews, see William B. Lockhart, Yale Kamisar, Jesse H. Choper, Steven H. Shiffrin & Richard H. Fallon, Jr., Constitutional Law 228-34 (8th ed. 1996), and Tribe, cited above in note 219, at 305-13.

n269. See Heinzerling, supra note 223, at 217-18 (asserting that "the Court's nondiscrimination principle" and decisions applying it "have provoked little disagreement on the part of individual Justices, and legal scholars have overwhelmingly approved it").

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There tends, if anything, to be even stronger consensus supporting those constitutional tests that can be seen as surrogates for explicitly purpose-focused inquiries. These tests generally apply heightened scrutiny to governmental regulations that are likely to reflect impermissible purposes. Some theories, and some Justices of the Supreme Court, might view elevated scrutiny as independently justified by the effects of such regulations. These effects frequently include keeping the public largely ignorant of disfavored points of view, when statutes regulate speech on the basis of content; burdening or stigmatizing minorities, when statutes classify according to race or analogous categories; and promoting economic balkanization and related inefficiencies, when state regulations disproportionately burden out-of-staters. But modern doctrine explicitly eschews effects-based review in many areas. n270 Even if other considerations also apply, the desire to erect a prophylactic barrier against regulations likely to be motivated by impermissible purposes almost certainly fortifies the doctrinal structure.

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n270. See supra section III.B.2.

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Because convergence of competing theories is important in determining which purposes are constitutionally impermissible, as well as when tests that function partly as surrogates for purpose inquiries ought to be employed, purpose tests and their surrogates are frequently examples of what Professor Sunstein calls "incompletely theorized agreements." n271 In articulating or enforcing a purpose-based test, the Supreme Court typically does not, and probably could not, fully explain why a particular purpose is constitutionally forbidden; there may be no full agreement on the reason, despite consensus concerning the judgment. n272 Nonetheless, the conclusion that particular purposes are forbidden, or that forbidden purposes are likely to underlie particular kinds of regulations, can be an important one. Such conclusions can [*102] provide the basis for stable legal agreement among those with differing background theories. n273

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n271. Sunstein, supra note 11, at 4-5, 35-61.

n272. See id. at 47 ("The distinctly legal solution to the problem of pluralism is to produce agreement on particulars, with the thought that often people who are puzzled by general principles, or disagree on them, can agree on individual cases.").

n273. Because they tend to be supported by a genuine, enduring, overlapping consensus, see supra note 262, constitutional tests that identify forbidden governmental purposes have an important advantage over balancing approaches. In perhaps the most important sense in which the term is used, balancing is a highly controversial methodology, which assumes that constitutional rules should be specified at least in some cases by weighing competing Ainterests." Regardless of the validity of the well-known objections to this methodology, see supra pp. 79-80, those who think that balancing is irreducibly subjective or even incoherent will of course have an ongoing reason to object to any doctrine that requires it. By contrast, purpose-based tests are not so much a

methodology as they are rules; once purpose-based tests are established, they can often be applied in a way that will not trigger further dispute about their coherence or workability.

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When no further agreement is possible, and the Justices are unwilling to adopt balancing tests (for reasons discussed above), n274 purpose-based tests (and their surrogates) frequently define doctrines that are sharply limited in protective scope. In this setting, purpose tests and their surrogates tend to reflect not only an overlapping consensus, but also a lowest common denominator. The Supreme Court can often agree that action actually or presumptively taken for forbidden purposes should be invalidated, even when no majority believes that relevant constitutional norms merit the further protections that other constitutional tests (if used as supplements) would afford. n275

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n274. See supra p. 81.

n275. The concept of an overlapping consensus, see supra note 262, illuminates an interesting difference between purpose tests and balancing tests. As suggested above, adherents of different constitutional theories may concur that, as a matter of principle, action taken for certain purposes should be held constitutionally impermissible. Although they may disagree about whether relevant constitutional values should also be protected by effects or suspect-content tests, for example, adherents of diverse theories need not compromise any of their views to agree that, whatever else the Constitution may or may not forbid, it forbids action taken for certain illegitimate purposes. Whereas purpose tests are likely to reflect a partial convergence of otherwise competing conceptions of what would be constitutionally ideal, balancing tests may be more likely to represent a compromise or a second-best accommodation. Agreeing on the appropriate result in a particular case, the Justices may disagree (or be individually uncertain) about how they would rationalize the result and about how judicial doctrine would best reflect relevant constitutional principles. In a case such as this, even though they disagree about what test or analytical approach would be best in principle, the Justices may settle on a balancing test that rationalizes a shared conclusion, but does not reflect the view of some or even all of the Justices in the majority about how issues of the relevant kind would ideally be analyzed.

The point is not that balancing tests never reflect the principled view of a majority of the Justices about how doctrine would best be structured. There may be good reason, in at least some cases, to avoid determinate rules and instead employ balancing tests that leave room for discretion at the point of application. The point, rather, is that Justices who happen to regard balancing tests as second-best, but who would prefer different rules as offering the best justification for an agreed result, may sometimes agree on a balancing test (which they agree would yield the correct outcome in the case before them) as a compromise.

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E. Deferential Tests, Reasonable Disagreement, and Political Democracy

It is time to draw some strands together. Although the Supreme Court uses at least eight kinds of tests to implement constitutional [*103] norms establishing individual rights, I have suggested that the most important doctrinal tests do not, as is widely thought, characteristically call for wide-open judicial balancing; that many of the most important doctrinal tests tend instead to sort constitutional challenges into a two-tier framework involving the suspect and the nonsuspect; that such doctrinal tests perhaps typically reflect an aspiration to defer to the judgments of political institutions except in cases in which the political process is manifestly or presumptively untrustworthy; and that purpose-focused constitutional doctrines both fit with and help to implement the agenda of affording deference when deference can plausibly be given. n276

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n276. See Erwin Chemerinsky, The Supreme Court, 1988 Term -- Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 48-51 (1989) (arguing that the general aspiration of the Rehnquist Court is to defer to decisions by democratically accountable decisionmakers).

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As Professor Ely most famously suggests, the conjunction and overlap of purpose-focused constitutional doctrines and highly deferential judicial review in many cases not involving suspect-content rules may appear to be a conspicuously, almost tautologically, "democratic" response to the problem of reasonable disagreement in constitutional law. n277 "Democracy" is a much contested term, n278 however, and the theory of political democracy that is reflected in purpose-focused constitutional doctrine and two-tiered review is quite minimalist. n279

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n277. See generally Ely, supra note 187, at 87-104, 181-83 (arguing for judicial review aimed at protecting processes of political democracy and safeguarding minorities from majority prejudice, but otherwise deferring to decisions of democratically accountable institutions).

n278. See William E. Connolly, The Terms of Political Discourse 29-35 (3d ed. 1993) (treating "democracy" as an "essentially contested" concept).

n279. See Richard Davies Parker, The Past of Constitutional Theory -- And Its Future, 42 Ohio St. L.J. 223, 236-39 (1981).

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Comparison with modern versions of republican political theory n280 and with the kind of democratic theory often associated with the Carolene Products n281 case may illustrate the point. n282 Modern republican theory grounds the legitimacy of governmental action in an ideal of reasoned deliberation by representative decisionmakers in which all citizens are accorded equal concern and respect. n283 By contrast with versions of republican theory that would support judicial application of what I have called "appropriate deliberation" tests, n284 purpose tests [*104] and nonsuspect-content tests establish no judicially enforceable ideal of reasoned deliberation. n285

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n280. See sources cited supra note 171.

n281. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

n282. See id. at 152 n.4. For an incisive critique of the Carolene Products theory, see Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 717-18 (1985).

n283. See Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1541-42 (1988); Sunstein, supra note 79, at 31-32.

n284. See supra sections II.A.6, III.B.3. The link between republican political ideals and commitment to judicial review to ensure appropriate legislative deliberations is by no means a necessary one. It is possible to hold republican beliefs about the legislature's proper function, yet believe that aggressive judicial review tends more to undermine than to further the responsible, deliberative citizenship that forms the core of the republican ideal. For example, James Bradley Thayer argued that deferential judicial review is appropriate to encourage more thoughtful deliberation among legislators, who otherwise might proceed on the assumption that they can rely on the courts to correct their mistakes, and to ensure that "responsibility may be brought sharply home [to the people] where it belongs." Thayer, supra note 13, at 155-56. Moreover, strong similarities exist between modern republican and at least some liberal theories, including that of John Rawls, that also incorporate a political ideal of reasoned deliberation. See Richard H. Fallon, Jr., What Is Republicanism, and Is It Worth Reviving?, 102 Harv. L. Rev. 1695, 1730-31 (1989) (noting liberal analogues to and influences on modern republican ideals of reasoned political deliberation); Sunstein, supra note 283, at 1566-71 (drawing on Rawls's work in developing a theory of Aliberal republicanism").

n285. Such tests are generally consistent with "pluralist" political theories, which tend to depict politics as a pervasively self-interested struggle among contending interest groups. See Sunstein, supra note 79, at 32. On the whole, pluralist theories tend to support minimalist judicial review, based on the morally skeptical hypothesis that there is no objectively correct answer to political and distributive questions. See, e.g., Ely, supra note 187, at 54 (observing that "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles"); Fallon, supra note 284, at 1718 (discussing pluralists' characteristic skepticism). Reasoning from this skeptical hypothesis, pluralists typically conclude that courts should, for the most part, defer to the resolutions reached by the political process and should intervene only to correct certain process failures in the political market. See, e.g., Ely, supra note 187, at 54, 102-03 (asserting the inability of courts to appeal successfully to "objectively valid" moral principles and advocating a "representation-reinforcing" approach to judicial review under which courts should generally invalidate legislation under open-ended constitutional provisions only when systemic malfunctions of the "political market" render the political process Aundeserving of trust").

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A similar contrast exists with the democratic theory often associated with judicial efforts to protect "discrete and insular minorities." n286 Traditional minorities may suffer at least two types of disadvantage in the political and legislative processes. One is hostility. n287 The other is a relative dearth of sympathy, empathy, or concern. n288 In contrast with the appropriate-deliberation tests that would be supported by some political theories to protect traditionally disadvantaged minorities from a lack of equal concern in democratic deliberations, purpose-based tests and nonsuspect-content tests do not authorize courts to hold the legislature to ideals of sympathetic consideration of all groups' interests. Nor do such tests demand consideration of relative costs and benefits when the legislature "incidentally" burdens interests in the free exercise of religion or, sometimes, the freedom of speech. n289 Again, all that purpose and nonsuspect-content tests forbid is action [*105] that is manifestly irrational or specifically taken for proscribed purposes. n290

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n286. Carolene Products, 304 U.S. at 153 n.4; see also Owen M. Fiss, The Supreme Court, 1978 Term C Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 6 (1979) (terming the Carolene Products case "the great and modern charter for ordering the relation between judges and other agencies of government").

n287. See, e.g., Carolene Products, 304 U.S. at 153 n.4 (contemplating that Aprejudice" might result in the enactment of "statutes directed at particular religious, or national, or racial minorities" (citations omitted)).

n288. See Paul Brest, The Supreme Court, 1975 Term -- Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 14-15 (1976); Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1050 (1978); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 341-44 (1987).

n289. See supra note 168 (discussing anomalies in the application of the O'Brien test).

n290. This is not a conceptually necessary result under any test based on governmental purpose. See Strauss, supra note 83, at 956-57 (proposing a test under which discriminatory intent should be found in any case in which the government's decision would have been different if the adverse impacts "fell on whites instead of blacks, or on men instead of women"). In contrast with Professor Strauss's proposed conception, however, the definition of discriminatory purpose reflected under current law applies only when the government takes an action ""because of,' not merely "in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

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In short, purpose-focused and nonsuspect-content doctrines - at least when they are the practically exclusive mechanisms for the judicial implementation of constitutional norms - reflect at most a thin, minimalist conception of the democratic processes to which courts are often asked to defer. In an era characterized by widespread reasonable disagreement about constitutional and

political ideals, this conclusion should probably come as no surprise. There is as much reasonable disagreement about the substantive content of the ideal of constitutional democracy as there is about the appropriate scope of fundamental rights. n291

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n291. For recent discussions of competing conceptions of democracy and their relevance to constitutional adjudication, see Dworkin, Freedom's Law, cited above in note 19, at 15-26; Michelman, cited above in note 11; and Jane S. Schacter, Romer v. Evans and Democracy's Domain, 50 Vand. L. Rev. 361, 389-91 (1997).

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This observation, I hasten to add, is descriptive, not prescriptive. An important debate is under way about the substantive content, if any, of the ideal of constitutional democracy. n292 Appropriately, participants in this debate emphasize its central relevance not just to normative political theory, but to constitutional law. n293 Indeed, the Court itself, insofar as it acts to protect democracy, cannot help taking at least an implicit stand; adoption of a thin, minimalist conception of democracy implicitly rejects thicker, more substantive rivals. Moreover, the Court has in fact taken a strong, explicit, substantive stand with respect to at least one contested issue concerning the relationship of democratic theory to American constitutional law. In the name of federalism, a majority of the current Court tends to support doctrinal structures that protect state and local majorities against domination by national majorities speaking through Congress. n294 In the next Part, I [*106] deal at length with the Court's efforts to protect local as against national democracy, despite reasonable disagreement about which theory of democracy the Constitution embodies.

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n292. See sources cited supra note 291. For an insightful, critical introduction, see Michelman, cited above in note 11.

n293. See, e.g., Dworkin, Freedom's Law, supra note 19, at 15-26; Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, The Law Of Democracy: Legal Structure of the Political Process (forthcoming 1997); Michelman, supra note 11.

n294. See, e.g., Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (invalidating federal legislation requiring local officials to enforce a federal regulatory program); Seminole Tribe v. Florida, 116 S. Ct. 1114, 1128 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), and holding that Congress lacks authority under the Commerce Clause to abrogate the states' Eleventh Amendment immunity from suit in federal court); United States v. Lopez, 514 U.S. 549, 567-68 (1995) (enforcing a limit, aimed at protecting state and local governments' regulatory prerogatives, on Congress's regulatory powers under the Commerce Clause).

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IV. The Significance of Doctrine in the Supreme Court: The Ordinary and the Extraordinary in Constitutional Adjudication

Constitutional doctrine and the tests by which it is partly constituted matter enormously. Doctrine not only determines outcomes in the lower courts, n295 but also shapes the course of decision in the Court itself. As David Strauss notes, most constitutional adjudication occurs on the basis of precedent. n296 The argument among lawyers and Justices alike turns predominantly on the meaning of previous cases and the appropriate application of their tests. n297

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n295. For a critical and probing discussion of the obligation of lower courts to obey Supreme Court precedent, see Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 821-22 (1994).

n296. See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 887-88 (1996); see also Harry W. Jones, Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law, 4 Pace L. Rev. 11, 12 (1983) (analyzing the significance of stare decisis in constitutional adjudication); Monaghan, supra note 23, at 771 (same).

n297. See John Paul Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U. L. Rev. 1, 4 (1983).

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It is also a striking feature of our constitutional practice, however, that while recurrence to "first principles" n298 is not the norm, appeal to first principles is never, in principle, wholly out of order. n299 The result is a very rough, admittedly permeable distinction between "ordinary" and "extraordinary" adjudication in the Supreme Court. In "ordinary" cases, the Court - or at least a majority of the Justices - treats the issue before it as framed by precedent and the tests, norms, and limiting factors reflected therein. n300 The requirement of fidelity to the Constitution is met by fidelity to a reasonable structure for implementing the Constitution, grounds for reasonable disagreement notwithstanding. In "extraordinary" cases, the Court - or at least a majority - either treats the premise that a doctrine reasonably implements the Constitution as seriously in issue, n301 or it assumes that it cannot resolve the [*107] question before it without determining some fresh question of principle. n302

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n298. See supra note 20 and accompanying text.

n299. One measure of this phenomenon is the frequency, and sometimes the casualness, with which the Supreme Court overrules precedents. See, e.g., Monaghan, supra note 23, at 742-43 (discussing Supreme Court decisions overruling precedents during the 1986 Term).

n300. Cf. Kornhauser, Path-Dependence, supra note 15, at 173-77 (distinguishing among conceptions of stare decisis that would, respectively, bind successor courts to respect the results of precedents, the rules reflected in those precedents, and the reasons given by the courts establishing the precedents).

n301. For discussion of the Court's practice of overruling its own precedents, see, for example, Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 117-31 (1991); Jerold H. Israel, Gideon v. Wainright: The AArt" of Overruling, 1963 Sup. Ct. Rev. 211, 215-29; and Amy L. Padden, Note, Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee, 82 Geo. L.J. 1689, 1694-96 (1994).

n302. My distinction between ordinary and extraordinary cases bears some similarity to Ronald Dworkin's famous distinction between routine cases, which can be decided pursuant to established legal rules, and "hard cases," which require recourse to the principles that underlie established understandings and, in some cases, a reformulation of recognized rules in light of underlying principles. See Dworkin, supra note 51, at 81-88. Dworkin, however, insists that an ideal judge would use the same method in all cases -- that is, that an ideal judge would, in each case, ascertain or verify that established doctrinal formulations in fact accord with the underlying norms or principles that such formulations ought to reflect. See Dworkin, supra note 99, at 354. My claim is different. In ordinary cases, I argue below, the Justices frequently do and sometimes should follow precedents and apply doctrinal tests without reaching the question (at least in their published opinions) whether those tests precisely capture the underlying principles that the law ideally ought to reflect. In extraordinary cases, by contrast, the Justices confront questions of underlying principle directly. It is possible that even in ordinary cases, an ideal Justice's implicit decision to proceed within a pre-existing doctrinal framework might be conceptualized as reflecting a judgment that the existing framework accords with relevant constitutional principles. As I suggest below, however, decisions about when to accept and when to reject existing doctrinal equilibria appropriately have practical, prudential, and quasi-tactical elements that Dworkin's formulation, which characterizes adjudication in both hard and easy cases as a relentless effort to render judgments reflecting underlying legal principles, does not fully capture.

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No clear convention fixes when the Court will treat a case as extraordinary, and thus as requiring a direct examination of constitutional principles, and when the Court will purport to apply established doctrine as a matter of routine. n303 Some cases strike nearly everyone as obviously extraordinary. One relevant category includes cases that differ obviously and dramatically from those for which pre-existing doctrine was crafted. In a case decided during the past Term, for example, the Court confronted the question whether First Amendment doctrines developed for more traditional media should apply to speech on the Internet. n304 On other occasions, a decision in one case, possibly with striking or anomalous facts, may rest on principles that are not easily reconciled with the rationales of other cases. During the 1980s, for example, the Supreme Court's decision in Immigration and Naturalization Service v. Chadha n305 threw separation of powers jurisprudence into disequilibrium, n306 and the Court had to decide several other [*108] cases on grounds of first principle to re-establish a reasonably stable doctrinal scheme. n307 Writings by Lawrence Lessig help to identify a third category of cases likely to be treated by the Court as extraordinary. n308 Lessig argues that judicial doctrine is often, almost inevitably, predicated on background assumptions about what is natural or reasonable. n309 As background understandings evolve, what once was

substantially uncontroversial will grow contestable, and it will be only a matter of time until the Court acknowledges that the doctrine requires reconsideration. n310 This happened, Lessig argues, with respect to the "separate but equal" doctrine of Plessy v. Ferguson; n311 a similar phenomenon may be unfolding now with regard to traditionally accepted discriminations against homosexuals. n312

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n303. See Monaghan, supra note 23, at 746.

n304. See Reno v. ACLU, 117 S. Ct. 2329, 2350 (1997) (invalidating provisions of the Communications Decency Act, which regulates speech on the Internet, as violative of the First Amendment).

n305. 462 U.S. 919 (1983).

n306. See id. at 958-59 (invalidating a so-called "legislative veto" provision in a federal statute). Whereas a number of earlier cases had taken what commentators have described as a Afunctionalist" approach in upholding broad congressional power over the structure of government, Chadha adopted a more "formalist" conception of the separation of powers. See generally Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1522-31 (1991) (describing "formalist" and Afunctionalist" approaches to the separation of powers); Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions -- A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 510-26 (1987) (critiquing the Court's inconsistent use of formalism and functionalism in two separation of powers cases).

n307. See, e.g., Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding the power of a commission in the judicial branch to promulgate sentencing guidelines); Morrison v. Olson, 487 U.S. 654, 696-97 (1988) (upholding provisions vesting the appointment of independent counsel in the judicial branch); Bowsher v. Synar, 478 U.S. 714, 726 (1986) (invalidating a delegation of executive powers to an official subject to removal by Congress by means other than impeachment). For a lively account of the issues at stake and of their ultimate resolution written by the Solicitor General who argued most of the central cases, see Charles Fried, Order And Law: Arguing the Reagan Revolution -- A Firsthand Account 133-71 (1991).

n308. See Lawrence Lessig, Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory, 110 Harv. L. Rev. 1785, 1801-02 (1997) [hereinafter Lessig, Erie-Effects]; Lawrence Lessig, Fidelity and Constraint, 65 Fordham L. Rev. 1365, 1400 (1997); Lessig, Fidelity in Translation, supra note 19, at 1211-14; Lessig, Understanding Changed Readings, supra note 19, at 410.

n309. See Lessig, Understanding Changed Readings, supra note 19, at 410-42.

n310. See Lessig, Erie-Effects, supra note 308, at 1800-07; Lessig, Understanding Changed Readings, supra note 19, at 410-42.

n311. 163 U.S. 537 (1896); see Lessig, Understanding Changed Readings, supra note 19, at 423-26.

n312. See Lessig, Understanding Changed Readings, supra note 19, at 415-19. Compare Romer v. Evans, 116 S. Ct. 1620, 1627 (1996) (invalidating a state constitutional amendment denying homosexuals a broad panoply of rights that are available to other citizens), with Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (upholding a state statute outlawing homosexual sodomy).

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A fourth category of potentially extraordinary cases probably reflects nothing more than the views, interests, or agendas of Justices who happen to sit on the Court at a particular time. Beginning with personal convictions about the desirability of doctrinal change, Justices may press, with more or less success, to persuade their colleagues to reconsider seemingly settled issues. n313 To cite just one more category, extraordinary cases can also be provoked by action by Congress, the Executive, or state legislatures aimed at prodding a judicial reconsideration of established doctrines. The most famous example involved the executive and legislative actions preceding the Court's "switch in [*109] time" during the 1930s, which produced a vast overhaul of Due Process and Commerce Clause doctrine. n314

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n313. See, e.g., Printz v. United States, 117 S. Ct. 2365, 2386 & nn.1-2 (1997) (Thomas, J., concurring) (suggesting that the Court should re-examine the holding of United States v. Miller, 307 U.S. 174 (1939), and determine whether the Second Amendment creates a personal right to bear arms that is incompatible with existing regulatory schemes).

n314. See Lessig, Understanding Changed Readings, supra note 19, at 444. For a discussion of competing historical and interpretive accounts, see id. at 444-72.

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Although many litigated issues seem plainly marked for the "ordinary" rather than the "extraordinary" category, the Constitution stands as a looming presence in every constitutional case in the Supreme Court. So located, the Constitution is always available to be drawn into the foreground, even when the Justices have reason - often rooted in some aspect of the phenomenon of reasonable disagreement - to want to keep fundamental issues discreetly in the background.

A. Stare Decisis in Constitutional Adjudication

The phenomenon of reasonable disagreement provides a potent reason for maintaining the principle of stare decisis in constitutional adjudication. n315 As I have emphasized repeatedly, reasonable people differ about how the Constitution would best be interpreted or applied. Complicating the problem, the division of views will not always be binary; n316 majority choice between clear, alternative positions is frequently not an option. Under such circumstances, the ideal of constitutional law requires willingness among those charged with implementing the law to accept reasonable, if not always ideal, premises as bases for coordinated decisionmaking. n317

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n315. The doctrine of stare decisis reflects the Latin maxim "stare decisis et non quieta movere -- stand by the thing decided and do not disturb the calm." Rehnquist, supra note 23, at 347. Familiar justifications for the principle of stare decisis include its effects in promoting fairness, efficiency, predictability, and stability. See, e.g., Monaghan, supra note 23, at 744-46 (discussing the role of stare decisis in limiting issues); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 595-602 (1987) (same); Rehnquist, supra note 23, at 347 (discussing the virtues of constraint by precedent).

n316. Even if the choice as to which party deserves to prevail on a particular issue is binary, the choice among rationales or tests indicating the outcome is not. See Easterbrook, supra note 15, at 815-17.

n317. See Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1371-77 (1997). I do not mean to suggest that every Justice is obliged to accept every "reasonable" premise that could command majority acceptance in every case, even when he or she believes that a better alternative exists. As I have suggested already, the Justices' obligation of fidelity is best conceived as existing within a project of implementing the Constitution successfully that necessarily involves many participants and is extended over time. Within this framework, a Justice is surely entitled to take the long view and sometimes to advance positions that are rejected by a current majority but that he or she believes the Court, possibly in the remote future, should come to accept. My only suggestion would be that a Justice, in considering whether to join a majority opinion that he or she thinks less than optimal, or whether instead to concur separately or to dissent, should evaluate these alternatives partly in light of their likely effects on the overall project of implementing the Constitution successfully over time. See generally Kelman, supra note 17, at 248-74 (discussing institutional considerations that do and should affect Justices' decisions about when to dissent or to concur separately).

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The doctrine of stare decisis helps to promote cooperation on these terms. First, stare decisis reflects an appropriate presumption that the [*110] result reached by a prior court was, if not the best possible, at least reasonable. n318 Second, and related closely, treating precedent as presumptively authoritative means that precedent, along with the doctrine it embodies, becomes a "focal point" n319 for possible agreement among Justices who are motivated to reach a coordinated resolution - that is, a majority opinion - on reasonable terms. n320 Even if a precedent does not reflect every or even any sitting Justice's view of how the Constitution would most optimally be implemented, it may, because of its status, reflect the result best situated to win majority acceptance as a reasonable accommodation of competing considerations. n321

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n318. See Frank H. Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422, 423 (1988); Note, supra note 23, at 1349.

n319. Strauss, supra note 296, at 910-13 (internal quotation marks omitted). The concept of "focal points" traces to Thomas C. Schelling, The Strategy of Conflict 58-80 (1960). Schelling introduced the term to refer to potential solutions to coordination or other problems that, for cultural or psychological reasons, are peculiarly salient and thus peculiarly capable of supporting agreements, coordinated behavior, and stable equilibria. See id.; cf. Lewis A. Kornhauser, An Economic Perspective on Stare Decisis, 65 Chi.-Kent L. Rev. 63, 78-82 (1989) (offering a game-theoretic interpretation of stare decisis as a coordination mechanism).

n320. In emphasizing the Areasonable," I loosely follow Rawls, supra note 11, at 48-54. Rawls distinguishes the "reasonable" from the "rational" as a distinctive attribute necessary to social cooperation in identifying and implementing principles of justice: "Insofar as we are reasonable, we are ready to work out the framework for the public social world, a framework it is reasonable to expect everyone to endorse and act on, provided others can be relied on to do the same." Id. at 53-54; see also Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311, 312 (1996) ("Reasonable principles reconcile the conflicting aims and interests of different people on terms that each could acknowledge as legitimate if they were to change places with those burdened by the pursuit of their ends.").

n321. See Strauss, supra note 296, at 913. This is especially true under circumstances in which "it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (citations omitted).

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In recent years, commentators have questioned whether the principle of stare decisis, on which the edifice of doctrine rests, carries weight in the Supreme Court. n322 The skeptical commentaries draw their plausibility from two phenomena. First, the Court not only can overrule its own precedents, but actually does so with some frequency. n323 Second, with respect to many contested issues, the Justices [*111] who dissent in one case refuse to abandon their positions in subsequent cases. n324 In fact, however, these phenomena merely demonstrate what is not seriously in doubt: the principle of stare decisis is not absolute. It exerts some influence but does not determine every case. n325

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n322. See Philip P. Frickey, A Further Comment on Stare Decisis and the Overruling of National League of Cities, 2 Const. Comment. 341, 351 (1985) ("Stare decisis is probably often only a minor factor in each Justice's voting calculus."); Gerhardt, supra note 301, at 76-77 (noting Athe apparent lack of consistency in the Justices' standards or reasons for overruling precedents"); Earl M. Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467, 467 ("It seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent -- new or old -- has been safe."); Rehnquist, supra note 23, at 371-75 (suggesting that precedents have little or no influence in stopping the Court from doing what it would wish to do without the precedents).

n323. See, e.g., Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985)); Seminole Tribe v. Florida, 116 S. Ct. 1114, 1128 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)). For further discussion of Agostini v. Felton, see section IV.B.5 below. For discussion of the Court's overruling practices, see sources cited above in note 301.

n324. Celebrated examples include the continuing insistence of some Justices that the Court erred in recognizing a "fundamental" right to abortion in Roe v. Wade, see, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); the reiterated assertion of Justices Brennan and Marshall that the death penalty was per se unconstitutional, see, e.g., Sorola v. Texas, 493 U.S. 1005, 1011 (1989) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari); and the longstanding position of Justice Black that, notwithstanding the Court's contrary decision in Roth v. United States, 354 U.S. 476 (1957), the First Amendment protected even "obscene" speech from governmental regulation, see, e.g., Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting). Cf. City of Boerne v. Flores, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting) (urging reconsideration of the Free Exercise Clause test laid down in Employment Division v. Smith, 494 U.S. 872 (1990)); id. at 2186 (Souter, J., dissenting) (reiterating objections to Smith set out in an earlier case, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)). See generally Kelman, supra note 17, at 248-58 (assessing the option open to Justices of refusing to recognize the authority of a decision from which they initially dissented).

n325. For a discussion of the varying degrees of influence that stare decisis appears to exert on different Justices, see Gerhardt, cited above at note 301, at 117-31.

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B. Ordinary Adjudication

The phenomenon of the Supreme Court's treating cases as occasions to apply doctrine is perhaps too banal to merit remark. Nonetheless, anyone wishing to understand the role of doctrine must attend to ordinary cases and their bearing on the issue of constitutional fidelity.

1.

Constitutional Doctrine and the Judicial Agenda. -

The Supreme Court's disposition to treat settled doctrine as a focal point for stable equilibrium n326 plays a large, recognized role in shaping the Court's agenda. n327 Some questions, once having been resolved, are subsequently assumed to be off the table, even though they were sharply contested in the past and could conceivably become controverted again. At the present time, for example, the Court appears uninterested in arguments disputing that the Fifth Amendment estab- [*112] lishes an equal protection norm that binds the federal government; n328 that the Equal Protection Clause protects against discriminations involving voting rights; n329 or that the Establishment

Clause, as incorporated by the Fourteenth Amendment, forbids state as well as federal establishments of religion. n330

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n326. For a theory that doctrine reflects a different kind of equilibrium, see McNollgast, cited above at note 2, which characterizes stare decisis as "a self-enforcing equilibrium" resulting when judges "have no incentive to break with established precedent," because a clear Supreme Court majority exists and will reject efforts to resist the equilibrium. Id. at 1666-67. According to McNollgast, equilibrium tends to break down as a result of political forces -- when, for example, newly appointed judges supported by strong political coalitions broadly resist existing doctrine, and the Supreme Court, for strategic reasons, abandons efforts to hold the line. See id. at 1635; see also William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term -- Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 28-29 (1994) (developing a theory in which the Supreme Court attempts to create a sustainable legal equilibrium in light of the Justices' own policy preferences, the evolving positions of other branches of government, and emerging political forces).

n327. See Gerhardt, supra note 301, at 78 (noting the influence of stare decisis on the Court's exercise of its certiorari jurisdiction); Monaghan, supra note 23, at 744 (noting that "stare decisis plays a very large role in constitutional law" (emphasis omitted)).

n328. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211-15 (1995).

n329. See Abrams v. Johnson, 117 S. Ct. 1925, 1935-36 (1997); Miller v. Johnson, 115 S. Ct. 2475, 2483 (1995); see also Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997) (applying the rule that "race [may] not predominate over ... traditional districting principles").

n330. See Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997) (citing cases in which the Establishment Clause was applied against state, rather than federal, establishments of religion).

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Any of these claims might well be contested if the issues were treated as ones of first principle. n331 In addition, as I have suggested already, no formal obstacle precludes a party from raising any of the aforementioned issues for fresh consideration. n332 Nonetheless, a clear majority of the Justices regards these issues as settled. n333 Moreover, I doubt that any of the Justices would feel compelled to treat any of the issues listed above as requiring serious reconsideration even if a litigant pressed the demand. If not, why not? Why does fidelity to the Constitution not require reconsideration?

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n331. See, e.g., Reynolds v. Sims, 377 U.S. 533, 590-91 (1964) (Harlan, J., dissenting) (arguing that the Fourteenth Amendment was not originally understood or intended to protect voting rights); School Dist. v. Schempp, 374 U.S. 203, 254 (1963) (Brennan, J., concurring) (acknowledging that "it has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation "respecting an establishment of religion' is

conceptually impossible because the Framers meant the Establishment Clause ... to foreclose any attempt by Congress to disestablish the existing official state churches"); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 711 (1975) (noting that "there is no textual warrant for reading into the due process clause of the fifth amendment any of the prohibitions directed against the states by the equal protection clause").

n332. Even if the Court does not grant certiorari with respect to one of these issues, a respondent is entitled to argue any ground consistent with the record on the basis of which the judgment might be sustained. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, Supreme Court Practice 363-64 (7th ed. 1993).

n333. See cases cited supra notes 328-330.

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Part of the answer undoubtedly lies in stare decisis. Yet it seems doubtful that stare decisis, as a principle of only limited weight, could establish that it would be affirmatively wrong, independent of the merits, to reject any of the settled propositions recited above. If so, it seems fair to conclude that the Justices understand their personal obligations of fidelity to the Constitution as partly defined and limited by others' views about how the Constitution is appropriately interpreted. This is a defensible position. Implementing the Constitution successfully is a project that involves many elements and requires the coordinated efforts of many people. To invite indiscriminate re-fighting of constitutional battles, and to raise attendant doubts about the stability of doctrine generally, would do more to retard than to advance the project of constitutionalism, which requires reasonable closure of at [*113] least some issues about which people disagree. When an argument seems destined for rejection by a majority of the Court, the obligation of constitutional fidelity does not absolutely require individual Justices to take that argument seriously - even if, were they to do so, some of the Justices might be disposed to conclude that it deserved to prevail. Given the practical character of their roles, the Justices are entitled to some flexibility in choosing their occasions for revisiting first principles.

2.

Principled and Pragmatic Acceptance of Tests. -

It takes a test to beat a test. Confronted with a case that requires resolution, the Court must apply some constitutional standard. Clearly, however, the Justices feel no obligation to resolve every case pursuant to the test that they, personally, would regard as best. To cite a single, well-known example, the three-part Establishment Clause test of Lemon v. Kurtzman n334 appears to have survived for more than two decades, despite recurrent complaints, n335 only because no majority could be mustered for a test to replace it.

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n334. 403 U.S. 602 (1971).

n335. See supra note 214 and accompanying text.

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In recent years, Justice Scalia has sometimes complained that balancing tests are, at most, barely compatible with the rule of law. n336 Yet this past Term he not only joined decisions, n337 but actually authored one, n338 in which the Court followed precedent and applied a balancing test. Similarly, Justices Scalia and Thomas have sometimes argued that constitutional fidelity requires decisions in accord with the original understanding of constitutional provisions. n339 Last Term, however, both Justices joined opinions that did not advert to the original understanding and might well have proved difficult to support on that basis. n340

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n336. See, e.g., Morrison v. Olson, 487 U.S. 654, 711-12 (1988) (Scalia, J., dissenting); Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring); Scalia, supra note 140, at 1187.

n337. See Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1367 (1997); Chandler v. Miller, 117 S. Ct. 1295, 1298 (1997); Maryland v. Wilson, 117 S. Ct. 882, 884 (1997).

n338. See Gilbert v. Homar, 117 S. Ct. 1807, 1810 (1997) (applying a doctrinally prescribed balancing test to determine that due process did not require a state employer to provide a hearing before imposing a temporary suspension on an employee charged with a felony); see also Scalia, supra note 140, at 1187 (acknowledging that, despite the desirability of a "law of rules," the Court "will have totality of the circumstances tests and balancing modes of analysis ... forever -- and for my sins, I will probably write some of the opinions that use them").

n339. See supra note 19 and accompanying text.

n340. See, e.g., Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997) (assuming that the First Amendment, as incorporated by the Fourteenth Amendment, bars certain state practices amounting to "establishments" of religion); Abrams v. Johnson, 117 S. Ct. 1925, 1935-36 (1997) (applying the Fourteenth Amendment to subject majority-minority voting districts to heightened judicial scrutiny). On the contestability of these doctrines, see sources cited in note 331 above.

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The task of crafting a new rule or test - or even a serious proposal for one - is hard work, requiring resources that may not always lie at [*114] hand. n341 And a failed effort can be costly. Sometimes in constitutional law, as in medicine, the governing principle should be: "First, do no harm." n342 This point may appear banal, but it fits uneasily with a familiar, idealized view of the judicial function. Although idealized theories are often richly illuminating, none of the Justices is Hercules, n343 and the Justices rightly do not regard it as part of their obligation of fidelity to the Constitution to proceed in every case as if they possessed Herculean capacities. To recur to a formulation that I used earlier, the Justices' overriding obligation of fidelity involves the project of implementing the Constitution successfully. In

pursuing this project, the Justices appropriately weigh the costs of delay against the risk of injudicious innovation.

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n341. Aware of their limited resources, Justices will occasionally signal that they would welcome fuller exploration of matters that they regard as relevant by other parties in future cases. See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1628 (1997) (Thomas, J., dissenting) (expressing a tentative view that, contrary to the Court's prior decisions, the Import-Export Clause was originally understood to bar some discriminatory state taxes that are currently barred by the negative Commerce Clause).

n342. Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2403 (1996) (Souter, J., concurring) (observing that, when the Court "knows too little to risk the finality of precision, ... the judicial obligation ... can itself be captured by a much older rule, familiar to every doctor of medicine: "First, do no harm'").

n343. Cf. Dworkin, supra note 99, at 225-75 (developing a theory of law by depicting the approach to adjudication of an ideal judge, Hercules, with super-human powers); Dworkin, supra note 51, at 105-30 (same).

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3.

Doctrine, Ordinary Adjudication, and the Avoidance of First Principles -

I have described the line between ordinary adjudication, in which the Court resolves cases in light of precedent without explicit re-examination of first principles, and extraordinary adjudication, in which questions of guiding principle are squarely at issue, as "rough" and "permeable." Sometimes some Justices will insist that a fundamental question be addressed, while others resist the demand. M.L.B. v. S.L.J. n344 was such a case. As discussed above, M.L.B. presented the question whether Mississippi could enforce a rule requiring the prepayment of costs for civil appeals against an indigent mother who wished to challenge a probate court order terminating her parental rights. By a 6-3 vote, n345 the Court accepted the mother's argument that the Mississippi rule created a scheme of unequal justice forbidden by the Fourteenth Amendment. As a matter of constitutional law, this argument drew its plausibility from a number of Supreme Court decisions, most rendered prior to the mid-1970s, holding that the states must sometimes waive rules that otherwise would preclude indigents from pursuing appeals or attempting to vindicate claimed legal [*115] rights. n346 Several of these decisions rested n347 In addition, two cases from the 1980s had established that state procedures for terminating parental rights affected unusually important interests and, accordingly, that the requirements of due process were heightened. n348

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n344. 117 S. Ct. 555 (1996).

n345. Justice Ginsburg wrote the opinion of the Court, which was joined by Justices Stevens, O'Connor, Souter, and Breyer. See id. at 558. Justice

Kennedy concurred separately. See id. at 570 (Kennedy, J., concurring).

n346. See Mayer v. City of Chicago, 404 U.S. 189, 193-95 (1971); Boddie v. Connecticut, 401 U.S. 371, 380-82 (1971); Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Griffin v. Illinois, 351 U.S. 12, 17 (1956).

n347. See Mayer, 404 U.S. at 193 (quoting Griffin, 351 U.S. at 17); Griffin, 351 U.S. at 16, 18; see also M.L.B., 117 S. Ct. at 566 ("We observe first that the Court's decisions concerning access to judicial processes, commencing with Griffin and running through Mayer, reflect both equal protection and due process concerns." (citation omitted)).

n348. See Santosky v. Kramer, 455 U.S. 745, 753-54 (1982); Lassiter v. Department of Soc. Servs., 452 U.S. 18, 31 (1981).

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For Justice Thomas, who dissented, n349 M.L.B. raised issues that demanded re-examination of doctrinal premises. The petitioner relied on cases decided under the Due Process Clause. But if due process does not require a state to provide appeals at all - as the Court acknowledged n350 - Justice Thomas thought it bizarre to conclude that due process demands the waiver of financial barriers to appeals. n351 As a matter of principle, Justice Thomas therefore concluded, M.L.B.'s claim had to rest on the Equal Protection Clause. n352 But the Court had held, in the watershed case of Washington v. Davis, n353 that discriminatory impact does not trigger heightened judicial scrutiny in the absence of discriminatory intent. n354 On this understanding of the Equal Protection Clause, Justice Thomas argued, M.L.B.'s claim deserved to be rejected, n355 and older cases possibly ought to be overruled. n356 In any event, the Court needed to confront underlying questions of principle, both to resolve the case before it and to chart a doctrinal course for the future.

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n349. Justice Thomas's dissent was joined by Justice Scalia and in part by Chief Justice Rehnquist. See M.L.B., 117 S. Ct. at 570 (Thomas, J., dissenting).

n350. See M.L.B., 117 S. Ct. at 560.

n351. See id. at 572 (Thomas, J., dissenting).

n352. See id. at 571-72.

n353. 426 U.S. 229 (1976).

n354. See id. at 239-40.

n355. See M.L.B., 117 S. Ct. at 572-75 (Thomas, J., dissenting).

n356. See id. at 575.

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Writing for the Court, Justice Ginsburg rebuffed Justice Thomas's challenge. As framed by the Court, the case called for a relatively straightforward

application of precedents under the Due Process and Equal Protection Clauses. n357 Justice Ginsburg suggested that the equal protection grounds for decision predominated, n358 but she by no [*116] means disavowed reliance on due process. n359 Nowhere did she address the deep issues of principle that Justice Thomas raised. n360 Instead, by a process of analogy and distinction, she determined that M.L.B.'s case was most like those in which state rules impeding appeals by indigents had had to yield. n361

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n357. See M.L.B., 117 S. Ct. at 566 ("We place this case within the framework established by our past decisions in this area.").

n358. See id.

n359. See id. (treating due process cases and principles as part of the relevant doctrinal framework).

n360. Although Justice Ginsburg offered no overarching theory of either the Due Process or the Equal Protection Clause, she did distinguish Washington v. Davis, 426 U.S. 229 (1976). Unlike the government test challenged in Davis, the statute involved in M.L.B. did not merely have a disproportionate impact on an identifiable group; the burdens that it imposed Aapply to all indigents and do not reach anyone outside that class." M.L.B., 117 S. Ct. at 569.

n361. See M.L.B., 117 S. Ct. at 565-70.

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M.L.B. stands as a paradigmatic example of what Professor Sunstein calls judicial minimalism: n362 the opinion is "incompletely theorized" n363 in at least one sense, and probably in two. First, the opinion offers no broad theory of either due process or equal protection. Second, it is quite likely that at least some of the Justices constituting the majority were themselves uncertain how to give a deep, principled account of why the judgment was correct.

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n362. See Cass R. Sunstein, The Supreme Court, 1995 Term -- Foreword: Leaving Things Undecided, 110 Harv L. Rev. 4, 20 (1996).

n363. Sunstein, supra note 11, at 4-5, 35-61.

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Doctrine clearly abets incompletely theorized judgments by furnishing a framework in which determinations can be reached and "minimalistically" rationalized - that is, explained as defensible within the doctrinal framework, even if the framework is not itself justified by any broader theory. Given doctrine, the Justices frequently need not agree on much (including the grounds justifying the doctrine itself) in order to reach an agreed result. Moreover, as M.L.B. demonstrates, the Justices obviously believe that a shallow justification in terms of precedent at least sometimes satisfies their obligation of fidelity to the Constitution.

Professor Sunstein is relatively sanguine about this state of affairs. In his view, we have more reason to trust judges' quasi-intuitive, case-by-case judgments than we have to trust judges' capacity to frame broad, justifying theories. n364 As Sunstein recognizes, however, this is a generalization, not a rule. n365 Moreover, the best test of moral, political, and legal claims frequently involves their coherence with other propositions that we have good reason to accept. n366 Seen in this light, the [*117] Court's determined avoidance of questions of first principle in M.L.B. is at best a second-best approach.

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n364. See id. at 38-46, 194-96.

n365. See id. at 195.

n366. See, e.g., Nagel, supra note 12, at 109-25 (arguing that skeptical and relativist claims must be rejected if incompatible with other claims, including first-order ethical claims, that are better supported by reason and experience); John Rawls, A Theory of Justice 20-22, 48-53 (1971) (developing the concept of "reflective equilibrium" as a test of the soundness of political beliefs); Ronald Dworkin, Objectivity and Truth: You'd Better Believe It, 25 Phil. & Pub. Aff. 87, 119 (1996). Antecedents of coherence tests in ethics and politics trace back to Aristotle. See Stuart Hampshire, Two Theories of Morality 6-28 (1977). But cf. Joseph Raz, The Relevance of Coherence, 72 B.U. L. Rev. 273, 275 (1992) (disputing that coherence is central to the justification of belief).

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The same might be said of ordinary, precedent-based adjudication in general. Despite the possibility of reasonable disagreement in constitutional law, we trust the Supreme Court to decide contested issues, largely on the ground that the Court's decisions will at least be disciplined by the demands of principle n367 and by the requirement of articulate reason-giving. n368 And reason-giving, within the domain of constitutional law, potentially runs deep. All agree that the Constitution has priority over any implementing test; n369 doctrine is therefore subject to challenge. For the most part, it may be fair for the Court simply to presume that prior decisions have established doctrine that reasonably implements constitutional principles. But when the Court's majority declines a dissenting opinion's express challenge to justify its decision at a deeper level, it refuses to accept the full discipline of articulate justification that helps to support the legitimacy of judicial review.

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n367. See Bickel, supra note 91, at 69 ("When it strikes down legislative policy, the Court must act rigorously on principle, else it undermines the justification for its power.").

n368. See Frank I. Michelman, Justification (and Justifiability) of Law in a Contradictory World, in Justification 71, 85-87 (J. Roland Pennock & John W. Chapman eds., 1986); see also David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 737 (1987) (terming "reasoned response to reasoned argument" an "essential aspect" of the judicial process).

n369. See supra note 23 and accompanying text.

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Even so, there sometimes is no preferable alternative. Given reasonable disagreement about deep justifications, it may be impossible to muster a majority for any deeply reasoned response to a challenge such as Justice Thomas's in M.L.B. In light of reasonable disagreement, shallow reason-giving may be all that is possible. Due to the possible absence of a better, practicable alternative, to label the approach of the M.L.B. majority as second-best is not necessarily to condemn it. Nonetheless, we should not delude ourselves about the gap between second-best and the constitutional ideal. More than fidelity theorists have appreciated, constitutional law needs a theory of the second best.

4.

Doctrine and Distortion. -

Critics often complain that doctrinal tests distort constitutional analysis: tests obscure, and ultimately frustrate the enforcement of, underlying norms. n370 As a blanket condemnation, this complaint fails. Doctrinal tests typically function as [*118] rules for decision. n371 As measured by reference to their underlying rationales, doctrinal tests, like all rules, are prone to both overinclusiveness and underinclusiveness. n372 Yet for a rule to work as a rule, it must have some capacity to block all-things-considered judgments and even to bar direct appeal to its underlying rationale. n373

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n370. See, e.g., Baker, supra note 10, at 116 ("When taken seriously, these judicial tests can confuse analysis and deflect discussion from the real issues."); Nagel, supra note 10, at 182 (arguing that the use of doctrinal formulas "achieves organizational control and intellectual respectability, to the extent it does so, ... by impoverishing the Court's thought").

n371. See Schauer, supra note 9, at 308-09 (observing that the Supreme Court's First Amendment decisions have created a doctrinal structure dense with Arules" and "subrules"); Schauer, supra note 1, at 1470 ("It may be appropriate to think of opinion writing as (at least in part) a conscious process of rule making.").

n372. See Sunstein, supra note 11, at 130-31. Rules, by their nature, generalize, and most generalizations are less than wholly accurate. See Schauer, supra note 146, at 31-34.

n373. See Schauer, supra note 146, at 31-34.

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An example may clarify the point. A well-known First Amendment test establishes that content-based regulations of speech are invalid unless necessary to serve a compelling government interest. n374 Suppose that the underlying rationale for this rule is to prevent government from stifling speech based on its dislike of particular messages. Even on this hypothesis, it does

not necessarily follow that the rule against content-based discrimination should not apply in a case in which the government's regulatory purpose does not involve hostility toward a speaker's message. Consider, for example, a case in which the government attempts to ban political editorials on election day; n375 it does so not because it dislikes the messages that such editorials generally communicate, but because it thinks that such editorials leave those on the other side with no fair opportunity to respond. Even if the rationale does not apply, the rule, if it is a good one, should be allowed to function as a rule.

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n374. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116-18 (1991).

n375. See Mills v. Alabama, 384 U.S. 214, 215 (1966).

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The allure of "ordinary" adjudication pursuant to established tests does, however, invite (although it does not require) what might be viewed as a related pathology: the distension or manipulation of a doctrinal test in order to reach a result. As I have argued, for the Supreme Court to establish a doctrinal test is frequently a significant accomplishment. Effective implementation of the Constitution requires doctrine; and doctrine, once in place, serves as a focal point for reasonable agreement among the Justices. In addition, an exception to a rule stands on the same logical plane as the rule itself; n376 to recognize an exception therefore requires a decision of principle, which then may raise the issue of how far the principle supporting the exception ought to extend. In short, explicit departure from a test has the potential to upset a generally stable and relatively satisfactory equilibrium. What, then, should the Court do when straightforward application of a test would produce a result that some Justices regard as unacceptable?

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n376. See Frederick Schauer, Exceptions, 58 U. Chi. L. Rev. 871, 873 (1991).

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[*119]

For some Justices, Turner Broadcasting n377 may have presented this question. A federal statute requires cable television systems to reserve some of their channels for local television stations; cable operators and programmers challenged the must-carry rule as a restriction on their freedom of speech. n378 In its decision last Term, as in an earlier case between the same parties, Turner Broadcasting System, Inc. v. FCC (Turner I), n379 the Court accepted the well-established test that makes content-based regulations presumptively unconstitutional. n380 The dispute in Turner I focused on whether Congress's purpose in enacting the statute was content-based; if Congress enacted the statute to protect over-the-airwaves broadcasters based on a preference for the local and public affairs programming that they tend to carry, a majority agreed that the statute must be treated as a content-based restriction. n381 In a 5-4 decision, the Court concluded in Turner I that the statute's purposes were not content-based. n382 Accordingly, the Court remanded the case to the district

court for further factual findings to determine whether the must-carry provision survived intermediate scrutiny under the test of United States v. O'Brien. n383

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n377. 117 S. Ct. 1174 (1997).

n378. See id. at 1184.

n379. 512 U.S. 622 (1994).

n380. See Turner II, 117 S. Ct. at 1198.

n381. See Turner I, 512 U.S. at 641-52.

n382. See id. at 652 ("In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems.").

n383. See supra p. 74.

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The district court upheld the statute, n384 and the Supreme Court affirmed, again by a 5-4 vote, in Turner II. n385 For the majority, the central points were that Congress had reasonably concluded that the must-carry provision furthered the important governmental interest of promoting fair competition n386 and that the regulation was narrowly tailored to preserve a multiplicity of broadcast stations. n387 Writing in dissent, Justice O'Connor emphasized that there was significant disagreement over whether must-carry provisions were necessary for the economic survival of significant numbers of television broadcasters. n388 [*120] And if the provisions were not necessary, she argued, "it becomes evident that the [government's] interest has nothing to do with anticompetitive behavior, but has everything to do with content - preserving "quality' local programming that is "responsive' to community needs." n389 On this basis, Justice O'Connor and the three other dissenting Justices continued to insist, as they had in Turner I, that the must-carry provisions should be subjected to strict scrutiny under ostensibly unchallenged doctrine. n390

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n384. See Turner Broad. v. FCC, 910 F. Supp. 734, 751 (D.D.C. 1995), aff'd 117 S. Ct. 1174 (1997).

n385. See Turner II, 117 S. Ct. at 1203.

n386. See id. at 1186. Although concurring in the judgment, Justice Breyer appeared to disagree with this conclusion and based his concurrence on other government interests at stake: preserving the benefits of free, over-the-air local broadcast television and promoting the widespread dissemination of information from a multiplicity of sources. See id. at 1203-05 (Breyer, J., concurring).

n387. See Turner II, 117 S. Ct. at 1186, 1199. In making these findings, Justice Kennedy emphasized the deference owed to Congress. See id. at 1203 ("We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination.").

n388. See id. at 1207 (O'Connor, J., dissenting).

n389. Id. at 1212.

n390. See id. at 1208.

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According to one plausible view, the Turner cases represent an indefensible distension or manipulation of an established doctrinal test and an equally lamentable avoidance of an important question of constitutional principle. On this view, the government's purpose in enacting the must-carry regulations was clearly content-based: Congress wanted to preserve the economic viability of local, over-the-air broadcasters precisely because it valued the content of their programming, which typically includes local news, public service, and community affairs coverage. n391 But if the challenged must-carry rules cannot fairly be upheld under the O'Brien test for content-neutral regulations, this argument continues, it does not follow that they should be held unconstitutional. Instead, the Turner cases raise the question whether the Court should carve out an exception to the general rule prohibiting content-based regulation of speech for cases in which Congress regulates cable television (and possibly other media) for the purpose of promoting, not stifling, effective coverage of public affairs and diversity of programming. n392

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n391. See, e.g., id. at 1207 (asserting that "the only justification" supporting the purported governmental interest "is heavily content based"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring in part and dissenting in part) ("I cannot avoid the conclusion that [the statutory] preference for broadcasters over cable programmers is justified with reference to content."); id. at 685 (Ginsburg, J., concurring in part and dissenting in part) ("Congress' "must-carry' regime ... reflects an unwarranted content-based preference."); see also Baker, supra note 10, at 82 (critiquing the majority's conclusion that the statute was content-neutral); Eskridge & Frickey, supra note 326, at 47 ("The statute's insistence that cable companies program local stations and public broadcasting stations appears to be animated by what those stations are likely to say, and that is content-based.").

n392. See Baker, supra note 10, at 80-128 (arguing that the government should be permitted to regulate media entities in order to promote a desirable communications order and that the Court's preoccupation with doctrinal tests singling out content-based regulations for heightened scrutiny obscured the normative questions that it should have faced directly).

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Should some or all of the Justices in the Turner II majority have reached this question of high principle? Several considerations seem relevant. First,

not all of the Justices in the majority may actually have believed that the holding distorted, or even strained, the O'Brien doctrine. Second, if the Justices in the Turner II majority had confronted questions of first principle, it seems unlikely that they could [*121] have coalesced on any approach other than the O'Brien test that would have produced their preferred outcome; among other indications of the potential difficulty, the Court had fractured badly in a recent case involving the regulation of sexually explicit and offensive material on cable television. n393 Third, the generally stable doctrinal equilibrium that prevails under the O'Brien test - rooted in the principle that content-based regulations are subject to strict scrutiny - is a very valuable one, given the obvious bases for reasonable disagreement (and attendant legal uncertainty) on numerous First Amendment questions were the prevailing equilibrium to be upset. n394

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n393. See Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2381 (1996) (striking down some portions and upholding other portions of the Cable Television Consumer Protection Act ("the Act")). The two provisions of the Act that gave rise to the greatest division within the Court were 10(a), which permitted cable television operators to prohibit patently offensive or indecent programming on leased access channels, and 10(c), which did the same for public access channels. Justice Breyer, whose plurality opinion upholding 10(a) but invalidating 10(c) was joined by Justices Stevens and Souter, see id. at 2398, 2401, expressly disavowed application of any previously formulated First Amendment test and employed a highly contextual balancing methodology. See id. at 2384-88. Justice O'Connor generally agreed with Justice Breyer's methodology, but concluded that 10(c) should also be upheld. See id. at 2403-04 (O'Connor, J., concurring in part and dissenting in part). Justice Kennedy, joined by Justice Ginsburg, would have struck down both provisions as content-based restrictions subject to strict scrutiny. See id. at 2405-06 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have upheld both provisions on the rationale that the First Amendment protected the rights of the cable operators, which were actually promoted by the Act, rather than those of the programmers and viewers who challenged it. See id. at 2410-32 (Thomas, J., concurring in the judgment in part and dissenting in part).

n394. Compare Owen M. Fiss, State Activism and State Censorship, 100 Yale L.J. 2087, 2100-06 (1991) (arguing in favor of state efforts, sometimes including regulation, to promote diversity and equality in speech), with Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 226-27 (1992) (characterizing proposals to regulate speech in the name of equality as contrary to fundamental First Amendment principles and as a threat to liberty).

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Under the circumstances, a Justice who believed that it took some stretching of the O'Brien framework to reach the result that he or she thought correct (for reasons other than those reflected in the Court's opinion) might well have been justified in supporting some modest doctrinal distension. Much would depend on a calculation with a predictive, quasi-strategic element: how much would one or another approach to the case threaten to upset the doctrinal equilibrium established by United States v. O'Brien, and with what ill effects? The

question is not, as I see it, simply one of doctrinal coherence to be considered as a matter of abstract, theoretical reason. Resolving the issue calls for more practical and predictive judgments about how others' willingness to accept O'Brien as a focal point for reasonable agreement might be affected in future cases. I do not mean to imply that the Justices should engage in strategic bargaining marked by bluffs and threats, offers and counteroffers. I do suggest, however, that they must [*122] consider the importance of sustainable equilibria in domains of reasonable disagreement. n395

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n395. I believe that this position is consistent with Professor Shapiro's wise insistence on a carefully specified requirement of judicial candor. See Shapiro, supra note 368, at 737. I agree with Professor Shapiro that, for the obligation of candor to be satisfied, a Justice engaging in doctrinal distension must be willing to accept the implications in future, relevantly similar cases. See id. (noting the judicial obligation not to dissemble or mislead). I acknowledge, however, that what counts as a relevantly similar case will not always be obvious, and that future cases thus may provide occasions for bounding the distension introduced by the earlier decision.

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5.

Doctrinal Adaptation and "Ordinary" Overruling. -

In discussing the possibility of doctrinal "distension," I should not create the impression that ordinary constitutional adjudication, focused mostly on precedent, leaves little room for doctrinal adaptation. The Supreme Court regularly deals with difficult cases that call for contestable judgments about the meaning of precedents and their analogical force. In addition, established constitutional tests are often far from determinate. n396 As one decision follows another, constitutional doctrine can change relatively profoundly, without any direct attention to first principles. n397

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n396. See, e.g., Scalia, supra note 140, at 1180, 1186 (arguing that balancing tests fail to provide "much general guidance" concerning the resolution of future cases).

n397. As a result, the crude distinction between ordinary and extraordinary cases does not correlate perfectly with the equally crude distinction between cases in which the Court makes doctrine and those in which the Court instead applies doctrine. The Court treats some cases that call for the formulation of doctrine as entirely ordinary. For example, last Term's decision in Clinton v. Jones, 117 S. Ct. 1636 (1997), presented the novel question whether the Constitution required postponement of the trial of a civil suit against the President, based on "private" rather than Aofficial" acts, until the end of the President's term in office. See id. at 1644. Eschewing questions of first principle, the Court undertook to resolve the issue by applying the framework established by Nixon v. Fitzgerald, 457 U.S. 731 (1982), which recognized an absolute presidential immunity in suits for damages predicated on the President's official acts, see id. at 749. Reached within the Fitzgerald

framework, the Court's decision in Clinton rested largely on the empirical, predictive judgment that suits against the President arising from unofficial conduct were unlikely to interfere too much with the President's time. See Clinton, 117 S. Ct. at 1648.

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Among last Term's cases, a striking illustration of this phenomenon emerged in Agostini v. Felton, n398 in which a majority of the Court, with very little reference to deep issues of principle, actually overruled two important Establishment Clause cases n399 on the ground that their rationales had been undermined by intervening decisions. n400 At issue in Agostini, as in the earlier cases of School District of Grand Rapids v. Ball n401 and Aguilar v. Felton, n402 were programs under which public school teachers enter parochial school classrooms to teach secular remedial and enrichment classes. In Ball and Aguilar, the Court, by a [*123] 5-4 vote, found a violation of the "effects" prong of the three-part Lemon v. Kurtzman n403 test. n404 According to the majority, public employees on the premises of religious schools were likely to contribute to those schools' mission of religious inculcation; n405 in addition, the mixture of religious and secular education created a symbolic union of church and state and helped to finance religious education by sparing religious schools some costs that they might otherwise have borne. n406

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n398. 117 S. Ct. 1997 (1997).

n399. See id. at 2003, 2008. The two cases were School District of Grand Rapids v. Ball, 473 U.S. 373 (1985), overruled by Agostini, 117 S. Ct. 1997 (1997), and Aguilar v. Felton, 473 U.S. 402 (1985), overruled by Agostini.

n400. See Agostini, 117 S. Ct. at 2010.

n401. 473 U.S. 373 (1985).

n402. 473 U.S. 402 (1985).

n403. 403 U.S. 602 (1971).

n404. See Aguilar, 473 U.S. at 412-13; Ball, 473 U.S. at 392.

n405. See Ball, 473 U.S. at 387-89.

n406. See Aguilar, 473 U.S. at 410-11; Ball, 473 U.S. at 391-92.

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In overruling Ball and Aguilar, Agostini struck no blows at the continuingly resilient Lemon test. n407 Carefully parsing cases, Justice O'Connor's majority opinion first established that a subsequent decision had "abandoned the presumption ... that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." n408 Justice O'Connor then argued that the Court had "departed from the rule relied on in Ball that all government aid that directly aids the educational

function of religious schools is invalid." n409 In support of this proposition, the Court pointed to Witters v. Washington Department of Services for the Blind, n410 which had upheld a state's provision of a vocational tuition grant to a blind person attending a Christian college and pursuing education for the ministry. n411

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n407. See supra notes 214-215 and accompanying text.

n408. Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997). In Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), the Court upheld the use of a state-employed sign language interpreter to assist a deaf student in a parochial school. See id. at 13.

n409. Agostini, 117 S. Ct. at 2011.

n410. 474 U.S. 481 (1986).

n411. In a unanimous opinion, Witters deemed it crucial that the state made tuition grants generally available, without preference for religious schools or those wishing to attend them. See id. at 487.

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In light of these intervening developments, Justice O'Connor concluded, the effect of governmental programs remained crucial to Establishment Clause inquiries, n412 but the applicable effects test - or, perhaps more precisely, the presumptions guiding its application - had changed. n413 Under more recent precedents, public employees are no longer per se forbidden to work in parochial school classrooms, n414 and the even-handed provision of benefits to students in religious as well as secular schools does not, without more, evidence a forbidden [*124] effect of promoting religion. n415 Through ordinary adjudication, proceeding by narrow if contestable arguments about how agreed tests should be applied or prior decisions understood, n416 the Court concluded that the framework of constitutional law had not only changed, but had changed sufficiently dramatically to justify the overruling of Ball and Aguilar. n417

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n412. See Agostini, 117 S. Ct. at 2010.

n413. See id.

n414. See id. Dissenting in Agostini, Justice Souter read Zobrest narrowly and argued that its "rejection of such a per se rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer." Id. at 2023 (Souter, J., dissenting).

n415. See Agostini, 117 S. Ct. at 2014 ("Where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis[,] ... the aid is less likely to have the effect of advancing religion.").

n416. Justice Souter's dissenting opinion in Agostini, joined in whole by Justices Stevens and Ginsburg and in part by Justice Breyer, disagreed with this approach. Adverting directly to first principles, Justice Souter rejected the doctrinal framework applied by the majority insofar as it compromised the principle, which he thought too fundamental to be dismissed based on a few possibly mistaken precedents, that the government should not provide direct financial subsidies or their equivalents to religious institutions. See id. at 2020 (Souter, J., dissenting). Justice Ginsburg also wrote a dissenting opinion, addressing the procedural question whether the Court should have heard the Agostini case at all. See id. at 2027-28 (Ginsburg, J., dissenting).

n417. In the wake of Agostini, the looming question of foremost practical importance involves the constitutionality of "voucher" programs, through which school districts might help to fund the choices of parents and students who prefer religious to public, secular education. See, e.g., Tamara Henry & Lori Sharn, Schools Decision Could Affect Rulings on Vouchers, USA Today, June 24, 1997, at 3A; Douglas Kmiec, School Choice: Why Hasn't Its Time Come?, Chi. Trib., Aug. 25, 1997, at 13. Although some of the language in Agostini suggests that voucher programs would be permissible, see Agostini, 117 S. Ct. at 2011-12, the opinion seems too incompletely theorized to dictate a result, at least when the effect would be significant financial support for the religious education of proportionately large numbers of students, or when voucher programs might suggest an endorsement of religious education as superior to secular, public education. Justice O'Connor, who wrote the majority opinion in Agostini and whose vote would likely determine the constitutionality of a voucher program, has championed an "endorsement" test in other Establishment Clause cases. See supra note 219 and accompanying text. Not alluding to "endorsement" concerns, her opinion in Agostini did not bind her or any other Justice to a judgment about the permissibility of school voucher programs substantially broader than the program involved in Witters, 474 U.S. 481 (1986).

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6.

Shadows of Principle in Ordinary Adjudication. -

Ordinary, doctrine-based adjudication purports to focus on the correct application of closely analogous precedents and agreed tests. On the surface, the disputes involve technical canons constituting "the artificial reason of the law." n418 When is a precedent distinguishable? When is a case on point? When is an analogy a good one? n419

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n418. Charles Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 Tex. L. Rev. 35, 57 (1981) (internal quotation marks omitted).

n419. For a lucid discussion of the philosophical presuppositions of reasoning by analogy, see Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 923, 926 (1996).

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Judicial debates focused on questions such as these often seem both wooden and tendentious. n420 It is notorious, even to the Justices themselves, that a broad ambit frequently exists for reasonable disagreement about how precedents are best interpreted and tests best ap- [*125] plied. n421 Yet when the Court itself applies doctrine, clashing majority and dissenting opinions commonly characterize opposing views as flatly wrong about the force of analogies, the meaning of precedent, and so forth. What, one reasonably might ask, is going on?

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n420. See Duncan Kennedy, A Critique of Adjudication (Fin de Siecle) 56 (1997) (asserting that many arguments of this kind are conducted in a kind of "bad faith").

n421. This is especially clear in the Court's habeas corpus jurisprudence. Even before receiving congressional direction to do so, the Court ruled that federal habeas corpus relief generally is not available to state prisoners if the challenged state court decision was "reasonable" (even if not "correct") at the time their convictions became final. See, e.g., Butler v. McKellar, 494 U.S. 407, 414 (1990); Teague v. Lane, 489 U.S. 288, 310 (1989). In applying this standard, the Court typically views the bounds of reasonable disagreement as very broad indeed. See, e.g., O'Dell v. Netherland, 117 S. Ct. 1969, 1977-78 (1997) (holding that barring a capital defendant from informing a sentencing jury that he was parole-ineligible was not unreasonable under judicial precedent); Butler v. McKellar, 494 U.S. 407, 416 (1990) (finding that permitting police interrogation following a suspect's request for counsel in a separate investigation was not unreasonable). The Court has also taken explicit account of doctrinal uncertainty and indeterminacy in other areas in which it has made legal consequences turn on the question whether one of the parties to a case either relied on or asked a court to craft "new law." For a discussion of doctrines incorporating a concept of "new law," see Fallon & Meltzer, cited above in note 57, at 1734.

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One possibility is that the doctrinal disputes characteristic of ordinary adjudication are substantially independent of debates about constitutional first principles. On this view, doctrine blocks recourse to principle, much as rules, in order to function as rules, must bar all-things-considered judgments. n422 The difficulty with this view is obvious: in cases in which there really is room for reasonable disagreement about how doctrine would best be applied, n423 debates about application, if divorced from issues of constitutional principle, would be not only arid, but obtuse. Ordinary adjudication - in a case such as Agostini, for example - ineluctably occurs in light of the Justices' sometimes divergent conceptions of underlying values n424 even if the Justices neither advert explicitly to first principles, nor attempt to defend or attack the doctrinal framework within which ordinary adjudication takes place. Even in ordinary adjudication, in other words, views about matters of background principle almost certainly dominate the interstices of doctrinal argument and guide contestable judgments. Nonetheless, the central debate is often submerged, and, it might be asked, to what defensible end?

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n422. See supra p. 118.

n423. I do not mean to suggest that every case falls within this category. See, e.g., Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 405-07 (1985) (discussing the numerous easy cases in constitutional law).

n424. Cf. Raines v. Byrd, 117 S. Ct. 2312, 2324 (1997) (Souter, J., concurring) ("Because it is fairly debatable whether appellees' injury is sufficiently personal and concrete to give them standing [under judicially fashioned standing tests], it behooves us to resolve the question under more general separation-of-powers principles underlying our standing requirements."). See generally Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Adjudication, 100 Harv. L. Rev. 1189, 1231 (1987) (arguing that considerations within different categories of constitutional argument frequently suffuse and inform judgments about matters formally within other categories).

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[*126]

Again, the justification for the submersion of what is most fundamentally at stake must be that this is a second-best way of implementing the Constitution under circumstances of reasonable disagreement. To cite just one example, the five Justices who constituted the majority in Agostini have disagreed, sometimes bitterly, about the precise principles that Establishment Clause jurisprudence ought to reflect. n425 Reasonably disagreeing (or, aware of grounds for reasonable disagreement, being individually uncertain) about how guiding principles would best be specified, a majority of the Justices may nonetheless agree about a result and about a shallow explanation, and they may further agree to keep intact a doctrinal structure that they believe helps to implement constitutional values reasonably well.

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n425. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas have all attacked the "objective observer" test favored by Justice O'Connor. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-70 (1995) (Scalia, J.); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). And in Lee v. Weisman, 505 U.S. 577 (1992), the Chief Justice and Justices Scalia and Thomas divided sharply with Justice Kennedy. See id. at 635.

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Recognition that ordinary adjudication is only a species of second-best may help to explain why some of the best constitutional theory literature explicitly offers an idealized or reconstructed account of constitutional adjudication, not a descriptive theory of what actually happens. n426 It is a bit discomfiting to recognize how much of the contest of principle occurs in the interstices of doctrinal frameworks that may themselves be accepted only on second-best grounds, and equally discomfiting to acknowledge how much of the influence exerted by differing views of principle is implicit, rather than explicit. As I have suggested already, however, an ideal of what would be first-best should not obscure the practical need for approaches that are second-best; second-best approaches are sometimes necessary, in practice, for the Constitution to be implemented reasonably successfully.